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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeals from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

For Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees

REFERENCE TO REPORTED OPINION BELOW

The January 31, 1975 "Memorandum Opinion" by the statutory three-judge panel of the United States District Court for the Eastern District of Missouri, Eastern Division, in cause num-

ber 74-416C(A) is reported as *Planned Parenthood of Central Missouri*, etc., et al. v. *Danforth*, etc., et al., at 392 F. Supp. 1362 (E.D.Mo. 1975).

STATEMENT OF JURISDICTIONAL GROUNDS

On June 17, 1974, plaintiff[1] filed their "Verified Complaint for Declaratory Judgment and Injunctive Relief," invoking federal jurisdiction: Under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; Under United States Code, Title 28, Chapter 85, Sections 1331 and 1343; Under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; Under United States Code, Title 28, Chapter 155, Sections 2281 and 2284; And under United States Code, Title 42, Chapter 21, Section 1983.

Plaintiffs, a not-for-profit Missouri corporation and two practicing physicians, all engaged in providing medical and surgical procedures for the termination of pregnancy, sought to have the recently enacted "House Committee Substitute for House Bill No. 1211" declared unconstitutional on its face and to have defendants enjoined from applying or enforcing the same.

Declaratory relief was requested pursuant to 28 U.S.C., Section 2201, and a statutory three-judge panel was convened on

[1] For the convenience and facility of this Honorable Court, by agreement of the parties and due to the parties' combining both appeals within a single brief, Planned Parenthood of Central Missouri, David Hall and Michael Freiman, appellants in Cause No. 74-1151 and appellees in Cause No. 74-1419, shall hereinafter be referred to as "plaintiffs", as they were identified in the District Court proceedings. John C. Danforth, appellee in Cause No. 74-1151 and appellant in Cause No. 74-1419, and J. Brendan Ryan, appellee in Cause Nos. 74-1151 and 74-1419, shall hereinafter be referred to as "defendants," as they were identified in the District Court proceedings.

June 19, 1974 pursuant to 28 U.S.C., Sections 2281 and 2284. Trial in this cause was conducted on July 22 and 23, 1974, and on January 31, 1975, a "Memorandum Opinion" entered upholding all challenged sections of said legislation, with the sole exception of Section 6(1) which was held to be unconstitutional and its enforcement accordingly enjoined. (Jur. St. A-1). 392 F. Supp. at p. 1374. Defendant Danforth filed his "Motion to Alter or Amend Judgment" in regard to said Section 6(1) on February 6, 1975 (Jur. St. A-33 to A-34) and the same was denied by "Order" of the United States District Court on February 12, 1975. (Jur. St. A-35).

The "Order, Judgment and Decree" and accompanying "Memorandum Opinion" of the statutory three-judge panel of the United States District Court of the Eastern District of Missouri, Eastern Division, denying plaintiffs' request for declaratory judgment and injunctive relief, were entered on January 31, 1975. Plaintiffs' "Notice of Appeal" was duly filed by plaintiffs on February 5, 1975 in the United States District Court for the Eastern District of Missouri, Eastern Division. (Jur. St. A-36).

In response to plaintiffs' "Motion for Stay of Application and Enforcement of Statute, Pending Appeal to the United States Supreme Court, and Authorities in Support Thereof," filed on or about February 7, 1975, this Honorable Court granted plaintiffs' said motion under identifying number A-656 on February 18, 1975. 420 U.S. 918 (1975).

Jurisdiction of this Honorable Court to review by direct appeal the "Order, Judgment and Decree" of the United States District Court, denying to plaintiffs the permanent injunction requested, is conferred by 28 U.S.C., Section 1253.

THE CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE STATUTORY PROVISIONS INVOLVED

House Committee Substitute for House Bill No. 1211

"Section 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) 'Abortion', the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) 'Physician', any person licensed to practice medicine in this state by the state board of registration of the healing arts.

Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

Section 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

Section 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended

to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

Section 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

Section 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physi-

cian, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

Section 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

Section 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

Section 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

Section A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not effect the provisions or ap-

plication of this Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are declared to be severable."

THE QUESTIONS PRESENTED

1. Whether "House Committee Substitute for House Bill No. 1211" (H.B. No. 1211), Section 2(2), redefining "viability" to be "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems", violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973)?

2. Whether H.B. No. 1211, Section 3(2), requiring various provisions as to the written consent of the patient for an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

3. Whether H.B. No. 1211, Section 3(3), requiring the written consent of a woman's spouse to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

4. Whether H.B. No. 1211, Section 3(4), requiring the written consent of an unmarried, less than eighteen years old woman's "one parent or person in loco parentis" to an abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

5. Whether H.B. No. 1211, Section 6(1), requiring physicians to exercise the same standard of care towards the fetus during the performance of an abortion, as would be exercised if the fetus were intended to be born, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

6. Whether H.B. No. 1211, Section 7, requiring in the event of a live birth resulting from an abortion not performed to save the life or health of the mother at all stages of pregnancy, that the parental rights of the mother and those of the father, if he consented to the abortion, shall be conclusively terminated and the child shall be an abandoned ward of the state, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?[2]

7. Whether H.B. No. 1211, Section 9, prohibiting, after the first twelve weeks of pregnancy, the termination of pregnancy by saline amniocentesis or similar methods, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?

8. Whether H.B. No. 1211, Sections 10 and 11, requiring the completion and maintenance by physicians of certain forms and records relating to abortion at all stages of pregnancy, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the rulings of this Honorable Court in *Roe*, supra, and *Doe*, supra?[2]

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[2] By agreement, the parties to these appeals have argued all questions appealed in both causes within their initial briefs, so as to simplify the presentation and discussion of the issues.

A STATEMENT OF THE CASE

Missouri "House Committee Substitute for House Bill No. 1211" was passed by the General Assembly of the State of Missouri on or about April 30, 1974, and was signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on June 14, 1974. The law, pursuant to Section A of the same, was effective immediately upon approval by the Governor.

On June 17, 1975, plaintiffs, a corporation operating as part of its program a medical clinic in Columbia, Missouri and serving seven rural counties, a physician and practicing obstetrician-gynecologist serving as Chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri Medical School and a physician and practicing obstetrician and gynecologist within the St. Louis, Missouri metropolitan area, filed suit against the application and enforcement of the same. All plaintiffs within their ordinary business and practice provide abortion services for their patients. Suit was filed on behalf of all physicians similarly situated and the class consisting of plaintiffs' patients desiring to terminate their pregnancies.

Plaintiffs' requests for a temporary restraining order and for a preliminary injunction were denied. Trial was conducted on July 22 and 23, 1974 and judgment rendered on January 31, 1975. Said judgment upheld the constitutionality of H.B. No. 1211, Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, denied permanent injunctive relief as to the same, declared Section 6(1) to be unconstitutional and issued a permanent injunction against the enforcement of same. (Jur. St. A-20). 392 F. Supp. at 1374.

The District Court upheld statutory provisions redefining viability, requiring the written certified consent of the patient,

requiring the consent of the woman's spouse if married, requiring the consent of one parent if the patient is an unmarried minor under the age of 18 years, terminating all parental rights if a live birth occurs, prohibiting the use of the saline and similar procedures and requiring the maintenance and preservation of certain medical data and records.

The District Court held unconstitutional a provision imposing a duty of care towards the fetus by a physician performing an abortion and enjoined defendants from enforcing the same.

A motion by defendant Danforth to amend the judgment as to Section 6(1) was filed on or about February 6, 1975 (Jur. St. A-33 to A-34) and denied by the District Court on February 12, 1975 (Jur. St. A-35).

Plaintiffs filed their "Notice of Appeal" herein on February 5, 1975 (Jur. St. A-36 to A-37) and defendant Danforth filed his "Notice of Appeal" herein on March 14, 1975.

Plaintiffs' motion for a stay of application and enforcement of this statute to this Honorable Court, filed on February 7, 1975, was granted on February 18, 1975. 420 U.S. 918 (1975).

Probable jurisdiction was noted by this Honorable Court as to both said appeals on October 6, 1975.

SUMMARY OF ARGUMENT

A. Section 2(2)—The Definition of Viability.

This Honorable Court in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973) established that viability could not be legislatively established by the states to be less than 24 weeks gestational age. Every state statute which has attempted to redefine the

"compelling point" in a manner inconsistent with this Honorable Court's holding has been declared void. *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D.Minn. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D. Utah 1973); *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631 (W.D. Ky. 1974); *etc.*

Viability must be assumed to mean the probability of meaningful survival of a particular fetus and not the mere possibility of the same; and this has been the holding of state courts involving civil actions. *Mitchell*, etc. v. *Couch*, 258 S.W.2d 901 (Ky.Ct.App. 1955); *Hall*, etc. v. *Murphy*, 236 S.C. 257 (1960), 113 S.E.2d 790; *etc.* To hold otherwise places physicians and patients in an untenable legal position, at odds with medical safety and reality.

B. **Section 3(2)—The Requirement of the Patient's Written, Certified Consent.**

This requirement violates the dictates of *Roe*, supra, and *Doe*, supra, by interfering with the abortion decision during all stages of pregnancy, imposing an extra layer of regulation and by favoring childbirth over abortion. It is contrary to the standards of *Word*, et al. v. *Poelker*, etc. et al., 495 F.2d 1349 (8th Cir. 1974). All similar requirements have been voided. *Hodgson*, supra; *Wolfe*, supra; *etc.*

C. **Section 3(3)—The Requirement of Spousal Consent.**

This requirement, although not directly confronted, was impliedly prohibited by *Roe*, supra, and *Doe*, supra. It gives to husbands the absolute right to veto arbitrarily his spouse's abortion, regardless of his participation in impregnating her. It is a power utterly void of reason or logic and would not be required by physicians, but for the statute. Its excepting clause of "necessary in order to preserve the life of the mother" is itself constitutionally defective for vagueness and for being in direct conflict with *Roe*, supra, and *Doe*, supra. Every court which has ruled on a similar provision has held the same to be unconstitutional. *Wolfe*, supra; *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975); *etc.* A spouse has no right to father children by any particular woman.

D. **Section 3(4)—The Requirement of Parental Consent for Unmarried Minors Under the Age of 18 Years.**

This requirement, although not directly confronted, was also impliedly prohibited by *Roe*, supra, and *Doe*, supra. Requiring parental consent serves no legitimate, reasonable nor compelling state interest. Only the pregnant minor, not her parents, bears all responsibility for the child once born. Pregnancy and childbearing is more dangerous and catastrophic to unmarried minors than it is to adults. All similar provisions have been held unconstitutional. *Doe* v. *Rampton*, etc., et al., supra; *Wolfe*, supra; *Poe*, supra; *Baird*, et al. v. *Bellotti*, etc., et al., 393 F. Supp. 847 (D.Mass. 1975) *cert. granted*, — U.S. — (1975); *etc.* Minors are entitled to constitutional guarantees (*In re Gault*, 387 U.S. 1 [1967]) and in particular analogous situations like contraception. *Population Services International*, et al. v. *Wilson*, et al., 398 F. Supp. 321 (S.D.N.Y. 1975); *etc.*

E. **Section 6(1)—The Physician's Standard of Care.**

The establishment of medical duties during an abortion, contrary to the free exercise of the right to abortion, cannot stand. The standard imposed defies the present state of medical knowledge and practice. All similar provisions have been declared void. *Hodgson*, supra; *Doe* v. *Rampton*, etc., et al., supra; *etc.*

The Section is not severable by the deletion of certain sentences. *State* ex rel. *State Board of Mediation* v. *Pigg*, 366 Mo. 798 (1951), 244 S.W.2d 75; *etc.*

F. **Section 7—The Termination of Parental Rights.**

The arbitrary termination of parental rights is totally lacking in due process and violates the basic concepts of *Stanley* v. *Illinois*, 405 U.S. 645 (1972). It denies equal protection to surviving children by a reverse discrimination favoring illegitimacy. An identical provision was voided in *Doe* v. *Rampton*, etc., et al., supra, and the reasoning on which it is based is contrary to findings reached in *Jones* v. *Smith*, et al., 278 So. 2d 339 (Fla.Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974).

G. **Section 9—The Prohibition of Saline and Similar Procedures.**

This prohibition as a practical matter would prohibit all post first trimester abortions in Missouri. It is a thinly disguised manner of preventing abortions under the veneer of preserving maternal health. It is contrary to the principles of *Roe*, supra, and *Doe*, supra, and an identical provision was voided in *Wolfe*, supra.

H. **Sections 10 and 11—Record Keeping and Reporting.**

These Sections are prohibited by *Roe*, supra, and *Doe*, supra, as to their expansive applicability to all abortions. They unduly and unwarrantedly interfere with the privacy of the medical relationship and the privacy and rights of a woman seeking an abortion. All similar regulations have been voided in *Doe* v. *Rampton*, etc., et al., supra; *Word*, supra; *Hodgson*, supra; *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141 (7th Cir. 1974), *cert. denied* 420 U.S. 997 (1975); *etc.*

THE QUESTION OF JURISDICTION

A. **Appeal No. 74-1151.**

Cases which sustain the jurisdiction of this Honorable Court in Appeal No. 74-1151, are: *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, et al., 406 U.S. 187 (1972); *Calero-Toledo*, et al. v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Gonzales* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90 (1974); and *MTM, Inc.*, et al. v. *Baxley*, etc., et al., 420 U.S. 799, 804 (1975) in which this Honorable Court stated,

> "In light of these factors, we conclude that a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below."

Clearly, this Honorable Court has jurisdiction of Appeal No. 74-1151 in which the constitutional merits of challenged Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 were resolved adversely to plaintiffs in said cause and permanent injunctive relief denied. (Jur. St. A-20). 392 F. Supp. at 1374.

B. **Appeal No. 74-1419.**

In Appeal No. 74-1419 plaintiffs suggest that the injunctive relief granted by the District Court (Jur. St. A-20; 392 F.Supp. at 1374) as to challenged Section 6(1) was unwarrantedly and improvidently granted. As stated in *Roe*, supra,

> "We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence

to this decision that the present criminal abortion statutes of that State are unconstitutional." 410 U.S. at 166.

This position has been faithfully followed in numerous District Court cases, post *Roe*, supra, holding newly enacted state abortion statutes unconstitutional. *Doe*, et al. v. *Israel*, etc., 358 F.Supp. 1193, 1202 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974); *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695, 699 (S.D.Fla. 1973), *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975); *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1019 (D. Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc. et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 639 (W.D.Ky. 1974).

No evidence was presented to the District Court on which a conclusion could be drawn that the defendants would not strictly observe the declarations of the District Court or that injunctive relief was appropriate. Accordingly, if the injunctive relief granted in this appeal as to challenged Section 6(1) was inappropriate *ab initio*, this Honorable Court would not have jurisdiction under the holding in *MTM, Inc.*, set forth above, supra.

ARGUMENT

I. Introduction

A. Roe and Doe.

On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional rights of women to terminate pregnancy in consultation with their physicians. *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973).[3] The two decisions, "of course, are to be read together."[4] It is difficult to recall other decisions of modern times which have had such a profound, intimate and daily impact upon the lives of so many citizens of this country. Ironically, it was these very rights which were invidiously being denied to women of the State of Missouri by the statutory Sections herein challenged, prior to this Honorable Court's issuance of a stay.[5]

Although fallaciously accused of "judicial legislation" by many, this Honorable Court in *Roe* was explicit and exacting as to what states may and may not do to regulate abortion. This Honorable Court very early in its decision stated,

> "The state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in pro-

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[3] When "*Roe*" and "*Doe*" are used infra, reference shall be to the specific cases cited in the text, supra, unless different citations or cases are indicated by the context.

[4] *Roe* at 165.

[5] 420 U.S. 918 (1975).

tecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[6]

This Honorable Court continued,

> "As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved."
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> . . .
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> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . ."
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> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[7]

Later, this Honorable Court repeated itself so as to make its dictates unmistakable,

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[6] *Roe* at 150.

[7] *Id.* at 159, 163.

> "To summarize and to repeat:
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> . . .
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> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interests in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[8]

The legislation herein challenged had impermissibly intruded into the decision-making privacy of the woman and the medical province of her physician. This Honorable Court unequivocably denied to the states the right to dictate specific medical policy and procedure in the constitutionally protected area of abortion, a right the State of Missouri had blatantly usurped by enacting the legislation herein at issue.

This cause challenges the constitutionality of Missouri "House Committee Substitute for House Bill No. 1211", as passed by the General Assembly of the State of Missouri on or about April 30, 1974 and signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on or about June 14, 1974. Its constitutionality was questioned by Governor Bond at the very moment of the Bill's signing. Plaintiffs have maintained throughout that, pursuant to Section B, the

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[8] *Id.* at 164-165.

statute is severable. Accordingly, plaintiffs have not sought to invalidate the legislation in its entirety, but have specifically challenged the following cited portions: Section 2(2); Section 3(2); Section 3(3); Section 3(4); Section 6(1); Section 7; Section 9; Section 10; and Section 11.

B. Post Roe and Doe.

1. Legislative action—judicial reaction.

Roe and *Doe* effectively voided the then existing laws regulating abortion in every state of the union.[9] Since January 22, 1973, a flurry of legislative and administrative action has attempted to thwart and to curtail the full effect of this Honorable Court's decisions. Whenever the same have been judicially challenged, the federal courts have struck them down, regardless of their nature or ingenuity, with the singular and conspicuous exception of the District Court opinion in the present cause.

Some statutes have sought to readopt the previously existing criminal legislation with only minor differences,[10] some to restrict criminally the decision and its effecutation on the state level,[11] some to restrict criminally the operation of clinics,

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[9] On January 22, 1973, 32 states had legislation of the Texas variety, 14 had legislation of the Georgia (A.L.I.) variety and four had a variety of reform beyond the A.L.I. model. *Roe* at: 118-119 at note 2; 139 at note 35; and 140 at note 37.

[10] *E.g.*: *Doe*, et al. v. *Israel*, etc., 358 F.Supp. 1193 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974).

[11] *E.g.*: *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al. 388 F.Supp. 631 (W.D.Ky. 1974).

whether on the state[12] or the local level,[13] some to prohibit abortions in public hospitals[14] and some to prohibit state medicaid payments for abortions.[15]

To argue, as defendants have done below, that this legislation does not prohibit abortions is specious. While it may be true that it does not absolutely prohibit abortion, neither did the original Missouri statute adopted in 1835, as amended, and voided in *Rodgers*, et al. v. *Danforth*, etc., et al. (unreported) (W.D.Mo., No. 18360-2, May 18, 1973), *affirmed* 414 U.S. 1035 (1973). The pre-1973 statute excepted procedures necessary to preserve the patient's life. The fine line distinguishing between prohibition, restriction and regulation is oftentimes illusionary, particularly when it involves a constitutionally protected fundamental right, such as abortion.

2. Medical and demographic benefits.

The demographical and medical statistics of abortion have changed drastically since January 22, 1973. Abortion data is now "factual material of clear 'public interest' ".[16]

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[12] *E.g.*: *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 (E.D.N.C. 1974).

[13] *E.g.*: *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974); and *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[14] *E.g.*: *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); and *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

[15] *E.g.*: *Doe*, et al. v. *Beal*, etc., et al., —F.2d — (3rd Cir. 1975); *Doe*, et al. v. *Rose*, etc., 499 F.2d 1112 (10th Cir. 1974); and *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (1974), *limited cert. granted*, — U.S. — (1975).

[16] *Bigelow* v. *Commonwealth of Virginia*, — U.S. — (1975).

In 1972, a total of 586,760 legal abortions were reported to the federal Center for Disease Control and a total of 615,831 were similarly reported for the year 1973.[17] It is generally conceded that the Center for Disease Control count is low because many procedures go unreported, inasmuch as such reporting is not mandatory. A more accurate and comprehensive count, although again based only on procedures voluntarily reported by cooperating facilities, indicates 745,400 for 1973 and approximately 900,000 for 1974.[18] The actual count for 1974 can safely be assumed to have exceeded 1,000,000 procedures.

Currently out of every 100 procedures in the United States: 1.5 patients were less than 15 years of age; 30.2 were between 15 and 19 years; 30.8 were between 20 and 24 years; 17.1 were between 25 and 29 years; and 17 were over 30 years of age.[19] Twenty-eight percent of the women were married and 72% were single, separated, divorced or widowed. Seventy-three percent were white and 27% were non-white.[20, 21]

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[17] *Center for Disease Control: Abortion Surveillance: 1972*, U.S. DEPT. H.E.W. (1974), at 1 and *Center for Disease Control: Abortion Surveillance: 1973*, U.S. DEPT. H.E.W. (1975), at 1.

[18] Weinstock, *et al., Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, 7 FAM. PLAN. PERSP. 23 (1975).

[19] *Legalized Abortion and the Public Health*, INSTITUTE OF MEDICINE: NATIONAL ACADEMY OF SCIENCES, Washington, D.C.: 1975, at 33.

[20] *Id.* at 36, 34.

[21] Statistics compiled on 13,000 procedures performed since May 1, 1973 by Reproductive Health Services in St. Louis, Missouri, the largest volume provider of services in the state, are similar. Two percent were less than 15 years of age, 15% between 15 and 17 years, 14% between 18 and 19 years, 34% between 20 and 24 years, 17% between 25 and 29 years, ten percent between 30 and 34 years, six percent between 35 and 39 years and two percent between 40 and 44 years. Seventy percent were white, 28% black, one percent Oriental and one percent other. Twenty-five percent were married, 57% single, 13% divorced, four percent separated and one percent widowed.

The broad legalization of abortion has been reflected in other important statistical areas. Septic abortions in the municipal New York City hospitals decreased 43% from 1969 (before liberalization) to 1973 (three full years following liberalization).[22] A 60% and 70% drop were reported by New York's Kings County and Harlem Hospitals, respectively.[23] A similar decline of 68% in San Francisco[24] and 77% in Los Angeles[25] were experienced in California following liberalization. It is not surprising that the number of patient reported "spontaneous" abortions also reflected a 61% decrease.[26]

Maternal mortality rates have also been lowered. Abortion related deaths in New York fell 76% from before liberalization to the period of 1972-1974.[27] A similar drop of 63% occurred in California.[28] It should be noted that the mortality rate for abortions does not equal the rate for childbirth (using a conservatively low rate for the latter) until the 19th week of preg-

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[22] *International Inventory of Information on Induced Abortion*, INTERNATIONAL INSTITUTE FOR THE STUDY OF HUMAN REPRODUCTION, Columbia University, New York: 1974, at 642.

[23] Osofsky, *et al., The Abortion Experience*, Harper and Row, Hagerstown, Md.: 1973.

[24] Stewart, *et al., Therapeutic Abortion in California: Effects on Septic Abortion and Maternal Mortality*, 37 J. OBSTET. AND GYNECOL. 510 (1971).

[25] Seward, *et al., The Effect of Legal Abortion on the Rate of Septic Abortion at a Large County Hospital*, 115 AM. J. OBSTET. AND GYNECOL. 335 (1973).

[26] Goldstein, *et al., Trends in Therapeutic Abortion in San Francisco*, 62 AM. J. PUB. HEALTH 695 (1972). In Missouri, the statistics demonstrate a 62.5% decrease in women reporting a prior illegal abortion when comparing 1973 to 1975. (For source of information, see note 21 supra.)

[27] NATIONAL ACADEMY OF SCIENCES, supra at note 19, at 83.

[28] Goldstein, supra at note 26, at 695.

nancy gestation.[29] Compared to surgical mortality rates generally, legal abortion in the first trimester is almost twice as safe as a tonsilectomy and legal abortion in the second trimester is 29 times as safe as an appendectomy.[30]

Births of children by unmarried women have also dramatically decreased by a rate of 12% in states having enacted less restrictive abortion legislation after 1970.[31]

In addition to the myriad of reasons taken under consideration during the abortion decision-making process and previously delineated by this Honorable Court,[32] the increasing use of amniocentesis for the intra-utero determination of metabolic disorders has enabled parents to predetermine the presence of certain suspected chromosomal abnormalities. Nearly 60 such disorders are now potentially discoverable. Results of one study indicated that 64% of parents with one genetically defective child when faced with any risk greater than ten percent of having a second child similarly afflicted, elected not to repeat pregnancy.[33] The threatened effect of challenged Section 9 would negate these effects and advances of genetic counselling.

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[29] NATIONAL ACADEMY OF SCIENCES, supra at note 19, at 75. When using the maternal mortality rate for 1970 of 26.8 per 100,000 births in the United States, the most recent year for which complete statistics are available; the rate is equal to that for an abortion performed well into the third trimester. *Vital Statistics of the United States (1973)*, U.S. DEPT. H.E.W.

[30] Child, *Surgical Intervention*, LIFE AND DEATH AND MEDICINE, W. H. Freeman and Company, San Francisco: 1973, at 65.

[31] Sklar, *et al.*, *Teenage Family Formation in Postwar America*, 6 FAM. PLAN. PERSP. 80 (1974).

[32] *Roe* at 153.

[33] Carter, *et al.*, *Genetic Clinic A Follow-Up*, 1 THE LANCET 281 (1971).

3. **Public comment.**

The *United States Commission on Civil Rights* has found that,

> "State legislatures have enacted a number of anti-abortion measures, including parental or spousal consent requirements, prohibition of certain procedures, restrictive regulation of abortion clinics, and denial of Medicaid payments for abortion procedures, which tend to restrict the freedom to limit childbearing provided by Roe and Doe."[34]

The Commission's Report recommended the rejection of "anti-abortion legislation amendments" and "the repeal [of] those which have been enacted, which undermine the constitutional right to limit child-bearing."[35]

As this Honorable Court has recognized,

> "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[36]

Public opinion has dramatically changed since the removal of the illegal stigma from abortion. Public opinion polls were conducted by members of the 93rd Congress within their constituencies. Of a total of 93 polls conducted, a majority of persons responding in 73 surveys supported a woman's right to abortion.[37] Of similar import is the Harris Survey poll during the Spring of 1975 in which 54% of persons polled

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[34] *Constitutional Aspects of the Right to Limit Childbearing*, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, Washington, D.C.: 1975, at 98.

[35] *Id.* at 101.

[36] *Stanton* v. *Stanton*, 421 U.S. 7, 14-15 (1975).

[37] *Public Opinion on Abortion Congressional Polls 93rd Congress*, NARAL, Washington, D.C.: 1974.

favored, 38% opposed and eight percent were not sure as to the legalization of first trimester abortion.[38]

The ultimate resolution of the issues in this cause will determine whether the medical, health, social welfare and other benefits which have accrued since the legalization of abortion, will be preserved and improved; or whether we shall return to the pattern of personal and legal hypocrisy, where available medical care for abortion is dependent upon one's place of residence, financial means or social standing and where a vociferous minority imposes their personal views upon all. A decisive and definitive ruling on the federal questions hereinafter raised will serve to prevent other litigation on the identical substantive issues and conserve judicial time and resources.[39]

II. The Applicable Constitutional Standards

A. First Amendment.

1. The right to give and to receive medical advice and treatment.

The present action has First Amendment implications which were not decided in *Roe* and *Doe*; namely, the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive

[38] See, HARRIS SURVEY, Louis Harris and Associates, Inc., May 26, 1975. Similarly, THE GALLUP POLL, Field Enterprises, Inc., June 8, 1975, found 21% of persons polled favoring legal abortions under any circumstances, 54% under some circumstances and 22% under no circumstances.

[39] *Law Students Civil Rights Research Council, Inc.*, et al. v. *Wadmond*, et al., 299 F.Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, *J.*), *affirmed*, 401 U.S. 154 (1971).

such information and treatment, free from unwarranted state interference. Physicians have constitutional rights to practice medicine, which now include the right to advise and to perform abortions.[40, 41]

The right to give medical advice can be characterized as free expression alone,[42] or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449, 462 (1958). This has been the case with the marital relationship,[43] and

[40] *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342, 1344 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974).

[41] "Indeed, there is language in Doe v. Bolton, supra, 410 U.S. at 194, 93 S.Ct. 739, from which it could be argued that the Court has already taken the step of extending constitutional protection to the privacy of the doctor-patient relationship." *Roe*, et al. v. *Ingraham*, etc., 480 F.2d 102, 108 at note 8 (2nd Cir. 1973).

[42] Similarly, it is an aspect of the physician's general liberty under the Fourteenth Amendment to practice his chosen profession free from unconstitutional restraint. See, *Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 (E.D. La. 1974), *affirmed* 419 U.S. 1098 (1975). See, also: *Law Students Civil Rights Research Council, Inc.*, et al. v. *Wadmond*, et al., 401 U.S. 154 (1971); *Willner* v. *Committee on Character and Fitness*, etc., 373 U.S. 96 (1963); *In re Griffiths*, 413 U.S. 717 (1973); *Greene* v. *McElroy*, et al., 360 U.S. 474 (1959); *Birnbaum* v. *Trussell*, etc., 371 F.2d 672 (2d Cir. 1966); *In re Stolar*, 401 U.S. 23 (1971); and *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971).

[43] See, *Griswold*, et al. v. *Connecticut*, 381 U.S. 479, 486 (1965), describing the marriage relationship as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

that of attorney and client.[44] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of people.

The right to practice medicine has consistently been protected by the federal courts. In *United States* v. *Freund*, 290 Fed. 411 (D.Mont. 1923), the Court invalidated a Prohibition Act which restricted the amount of alcohol a physician could prescribe.

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."[45]

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts lapsed into desuetude. See, *e.g.: United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, *J.*); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, *J.*); *Davis*, et al. v. *United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corporation, Inc.* v. *C. I. Lee & Co., Inc.*, et al., 45 F.2d 103

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[44] See, *National Association for the Advancement of Colored People* v. *Button*, etc., et al., 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen* v. *Virginia*, ex rel. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, et al., 389 U.S. 217 (1967); and *Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281 (8th Cir. 1974).

[45] 290 Fed. at 414. Cited with approval by dissenting Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 758 (N.D. Ohio 1970).

(2d Cir. 1930) (Swan, *J.*); and *Bours* v. *United States*, 229 Fed. 960 (7th Cir. 1915).

Many of the herein challenged Sections purport to control the physician's association with the patient by the imposition of certain acts and the requirement of certain speech within that relationship, even though the physician may not consider the same to be in the patient's best interests or to be required by standards of good medical practice.[46]

The giving of verbal medical advice and information is expression in its most pristine form. Words are certainly not conduct. The physician's expression, therefore, is surely entitled to at least the protection accorded in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (*per curiam*), to an outdoor speech by "a leader of a Ku Klux Klan group . . ." to his followers. The very nature of the counseling and pre-surgical discussion as to medical indications, risks, advisability and the like, that a physician has with a patient considering an abortion would be impermissibly constrained by many of the herein challenged Sections. *Brandenburg*, supra, reiterated,

> "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

Accordingly, a "statute which fails to draw this distinction intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." 395 U.S. at 448.

> "(W)hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

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[46] See, *e.g.*, challenged Sections 3(2), 3(3), 3(4), 7 and 9.

The nature of this governmental interest has been described by "a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-377. (Citations omitted).

There is no significant practical distinction between totally proscribing the physician-patient decision to abort and regulating the methodology or content of that decision's dialogue. Prior to *Roe* and *Doe* at least one federal court reached the First Amendment arguments.

> "First Amendment freedoms of speech and expression are clearly involved in the present case since the very language of the statute imposes a prohibition on any person who 'prescribes or advises or directs' a woman to terminate a pregnancy."
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> . . .
>
> "We conclude that the New Jersey abortion statute . . . chills and deters the plaintiff-physicians in the exercise of protected First Amendment activities; and that it violates plaintiff-physicians' rights under the Fourteenth Amendment to freely practice the profession of their choice."[47]

As recently stated by this Honorable court,

> ". . . the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. *Roe* v. *Wade*, 410 U.S. 113, 152-

[47] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler*, etc., 342 F.Supp. 1048, 1063, 1066 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

> 154 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965)."[48]

Intrusion by the State into the medical decision-making process between doctor and patient relative to abortion is constitutionally impermissible during the first trimester in any form; and during the latter trimesters unless such intrusion conforms to the standards discussed infra. (See, particularly IIB1a and b at 37 and IIB2 at 40).

2. **Entanglement of church and state through political divisiveness.**

The enactment of restrictive abortion legislation subsequent to January 22, 1973, violates the Establishment and Free Exercise Clauses of the First Amendment to the Federal Constitution.

In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Honorable Court developed the third segment of the present tripartite test of the Religion Clause. The dimension of entanglement involved with governmental interference in religions autonomy was itself developed into a bipartite concept one year later in *Lemon*, et al. v. *Kurtzman*, etc., et al., 403 U.S. 602 (1971). In *Lemon*, supra, Chief Justice Burger defined an additional and unique facet of entanglement, separate and distinct from the element of church-state intermingling.

> "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs . . . it can be assumed that state assistance will entail considerable political activity. Partisans . . . understandably concerned . . . and sincerely dedicated to both the religious and secular . . . will inevitably cham-

[48] *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 66 at note 13 (1973).

pion this cause and promote political action to achieve their goals. Those who oppose . . . whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith."

"Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."[49]

The warning of *Lemon*, supra, has been repeatedly echoed. "In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration."[50]

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[49] 403 U.S. at 622-623.

[50] *Committee for Public Education & Religious Liberty*, et al. v. *Nyquist*, etc., et al., 413 U.S. 756, 797 (1973).

The schism of opinion along religious lines engendered by this Honorable Court's decisions in *Roe* and *Doe* needs not be expounded here. It has, without question, been pervasive and deep-seated.

As stated in the applicable context of state aid to parochial schools,

> "Thus, it is the funding of basically religious institutions, being successive and repetitive, which would invite seasonal controversy and confrontation between proponents and opponents of such action. The injection of the absolutes and moral imperatives implicit in the propagation of any faith would work an inevitable distortion in the spirit of compromise and the acceptability of political differences which is characteristic of our political system. It is just such an eventuality that the framers of the First Amendment sought to avoid."[51]

The effort to prohibit all abortions in America is today a religious institution. The oft-times bitter debate which has raged over the issue of abortion and abortion legislation such as at issue here, has far exceeded the emotional and philosophical depth and breadth of debate surrounding state financal assistance to parochial educational institutions.

To retreat from the full implications and substance of the prior holdings in *Roe* and *Doe* by sustaining any of the herein challenged Sections, would violate the entanglement proscription of the First Amendment through the statutory codification of a denominational religious tenet.[52]

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[51] *Public Funds for Public Schools of New Jersey*, et al. v. *Marburger*, etc., et al., 358 F.Supp. 29 (D.N.J. 1973), *affirmed*, 417 U.S. 961 (1974). See, *Meek*, et al. v. *Pittenger*, etc., et al., 421 U.S. 349 (1975).

[52] For a discussion of abortion and the Religion Clause, see Tribe, "B. The Prohibited Role of the State: Religious Entanglement", in *THE SUPREME COURT 1972 TERM Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV., at 18-32.

Religious denominations have taken sides on the issue and have felt it incumbent upon themselves to take public stances on their positions. With the exception of the Catholic Church, nearly every major religious group in the United States has officially endorsed the right of a woman to terminate a pregnancy.[53]

B. Fourteenth Amendment.

1. Right of privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[54]

The right of privacy has been vastly developed since *Union Pacific Railway Company* v. *Botsford*, 141 U.S. 250 (1891), involving the pre-trial discovery right to a medical examination of plaintiff. It would be, perhaps, more accurate to say that the right of privacy has required greater expounding by the courts in reaction to the growth of governmental regulation, than to say that the right of privacy has grown.

> "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person . . . 'The right to one's own person may be said to be a right of complete immunity: to be let alone.' "[55]

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[53] This position has been endorsed by, among others: American Baptist Convention; American Ethical Union; American Humanist Association; American Lutheran Church; Central Conference of American Rabbis; Missouri Council of Churches; Presbyterian Church in the U.S.; Reformed Church in America; Religious Society of Friends (Quakers); Southern Baptist Convention; Union of American Hebrew Congregations; Unitarian Universalist Association; United Church of Christ; United Methodist Church and United Presbyterian Church in the U.S.A.

[54] *Roe* at 153.

[55] 141 U.S. at 251.

a. Differentiation of gestational periods.

In *Roe*[56] and *Doe*[57] this Honorable Court established various degrees of permissible state regulation of the abortion decision and its effectuation. These standards were geared to three gestational stages of pregnancy, the total period of which is normally "266-day(s)".[58]

The failure of state legislation to observe and to incorporate these restrictions have consistently been held by the federal courts to be constitutionally impermissible.[59] All of the challenged Sections in this cause fail to heed these distinctions, originally formulated by this Honorable Court as prior or subsequent to either "the end of the first trimester" or "viability".[60]

b. Equating abortion with other medical and/or surgical procedures.

This Honorable Court in *Doe* laid the initial groundwork for the principle that the medical procedure of abortion must be legislatively treated similarly to other medical and/or surgical

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[56] *Roe* at 163-165.

[57] *Doe* at 189.

[58] *Roe* at 125.

[59] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1351 (8th Cir. 1974); *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1149 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1016 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 636 (W.D. Ky. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189, 192 (D.Utah 1973); and *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695, 696-697 (S.D.Fla. 1973), *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[60] *Roe* at 163-165.

procedures of comparable risk. The history of post *Roe* and *Doe* legislation, however, has been persistently to single out the procedure of abortion for individualized statutory attention, usually of a pejorative and repressive nature.

In *Doe* this Honorable Court noted that the provisions of the Georgia law requiring Joint Commission on Accreditation of Hospitals approval,[61] hospital committee approval[62] and two-doctor concurrence[63] were not applicable to any other medical practices and stated,

> "The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."[64]

In the first appellate court decision dealing with newly enacted post *Roe* and *Doe* legislation the Eighth Circuit Court of Appeals held,

> "No other medical procedures or surgical operations are cited to us where the city or state regulates at the peril of criminal sanctions."
>
> . . .
>
> "Viewed another way, there is reason to strike down this ordinance. The ordinance seeks to protect interests that are already adequately protected by (1) the physician's medical judgment and professional, ethical standards and (2) the city and state health regulations which are in effect and which have application to clinical procedures in general. The extra layer of regulation which this ordinance imposes becomes unreasonably burdensome of the patients' and physicians' rights."[65]

[61] *Doe* at 193.

[62] *Id.* at 197.

[63] *Id.* at 199.

[64] *Id.* at 197.

The "extra layer of regulation" principle first enunciated in *Word*,[66] supra, has oft-times been repeated by federal courts which have voided municipal regulation of abortion clinics,[67] state regulation of abortion clinics[68] and state regulation of abortion procedures.[69]

> "By leaving the decision to those intimately involved, the Supreme Court has placed first and second stage abortions in that realm of medical judgment attendant to any health or medical procedure."[70]
>
> "The state then must treat abortions similarly to other medical procedures; it must wait until its interests as set out in *Roe* become compelling, and it must confine the regulation to only that interest."[71]
>
> "We have determined that given the 'fundamental right' status of a woman to terminate her pregnancy during the first trimester, that in no circumstances could we allow to stand regulations, purporting to promote maternal health,

[65] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1351 (8th Cir. 1974).

[66] *Id.*

[67] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1153 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[68] *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153, 1157 (E.D.N.C. 1974).

[69] *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008, 1017 (D.Minn. 1974), *appeal dismissed* sub nom. *Spannaus*, etc., et al. v. *Hodgson*, et al., 420 U.S. 903 (1975); and *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631, 636 (W.D.Ky. 1974).

[70] *Hodgson*, supra at note 69, at 1017.

[71] *Wolfe*, supra at note 69, at 636.

that are more expansive than regulations that are applied to other medical procedures of the same risk and complexity."[72]

In all of the herein challenged Sections, abortion has been singled out from among the multitude of other medical and/or surgical procedures for the application of repressive and grossly encumbering strictures.

2. **The State's burden of compelling interests.**

This Honorable Court has clearly recognized that the burden of justifying the type of legislation challenged here, which infringes upon the right of a woman and her physician to terminate a pregnancy, lies heavily upon the defendants.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' "[73]

This principle is particularly applicable when "one's beliefs, ideas, politics, religion, cultural concerns, and the like"[74] become involved; a situation present at bar.[75]

> "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[76]

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[72] *Friendship Medical*, supra at note 67, at 1153.

[73] *Roe* at 155. See, *Paris Adult Theatre I*, et al. v. *Slayton*, etc., et al., 413 U.S. 49, 65 (1973).

[74] *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974).

[75] See, Gelinas, "Roe *v.* Wade *and* Doe *v.* Bolton: *The Compelling State Interest Test in Substantive Due Process*," 30 WASH. & LEE L.REV. 628 (1973).

[76] *O'Connor* v. *Donaldson*, — U.S. — (1975).

While this axiom of the heavy burden upon the State to justify legislative interference with the fundamental right to an abortion is capable of being succinctly stated; its importance should not be overshadowed by its brevity or clarity. The State of Missouri herein has failed to demonstrate and to prove any state interests which even approach the level of interests of a woman seeking abortion, much less state interests of a compelling magnitude or nature.

3. **Due process.**

a. **The nature of due process and for whose protection.**

To infringe upon and to restrict the freedom and liberty of women and their physicians, as to the election and/or effectuation of an abortion, by the application of any of these challenged Sections would do injustice to the Due Process Clause of the Fourteenth Amendment. The standards by which legislation must be scrutinized as to its infringing or restrictive nature are those set forth by this Honorable Court in *Roe* and *Doe*.

The Due Process requirements in the abortion context afford protection to women and to their physicians. They do not safeguard the fetus because "the word 'person', as used in the Fourteenth Amendment, does not include the unborn."[77]

b. **Certainty, definiteness and the absence of vagueness.**

Many of the challenged Sections discussed more fully, infra, are constitutionally void by reasons of uncertainty, indefiniteness and vagueness. Facially, they provide insufficient and am-

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[77] *Roe* at 158. For the abstract principle applied to a specific fetus culminating in a live birth, see *Montana* v. *Kennedy*, etc., 366 U.S. 308 (1961).

biguous warning to physicians and to women as to the legal circumstances under which a given pregnancy can be terminated. The resulting and concomitant lack of clarity is a denial of due process of law.

A vast body of case law exists on the problem of unconstitutional uncertainty.[78] This doctrine has, moreover, several complementary and competing strands. The test most frequently articulated has been that,

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[79]

This is partly because,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[80]

The constitutional standard has been held to be,

> "violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated

[78] See, generally: Todd, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L.REV. 855 (1972-1974); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.PA.L.REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 MICH.L.REV. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

[79] *Connally*, etc., et al. v. *General Construction Company*, 269 U.S. 385, 391 (1926).

[80] *United States* v. *Reese*, et al., 92 U.S. 214, 221 (1875).

> conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, et al., 347 U.S. 612, 617 (1954).[81]

Clearly, "(v)ague laws in any area suffer a constitutional infirmity,"[82] be they of common law antiquity,[83] administrative[84] or criminal.[85] Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be more closely scrutinized. *Griswold*, supra dealt with "a right of privacy older than the Bill of Rights . . ."[86] and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "(p)re-

[81] Cited with approval in *Papachristou*, et al. v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

[82] *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[83] *Lanzetta*, et al. v. *New Jersey*, 306 U.S. 451, 454-55 (1939); *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, et al., 286 U.S. 210, 242-43 (1932). See, also: *United States v. Evans*, 333 U.S. 483 (1948) in which the statute had been passed in 1917; and *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

As Professor Amsterdam stated in his extensive study of vagueness, "common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard. . . ." Amsterdam supra at note 78, 109 U.PA. L.REV. at 84.

[84] The loyalty oath cases have virtually all involved administrative regulations. See *e.g.*: *Keyishian*, et al. v. *Board of Regents*, etc., et al., 385 U.S. 589 (1967); *Baggett*, et al. v. *Bullitt*, et al., 377 U.S. 360 (1964). See, also, *Soglin*, et al. v. *Kauffman*, etc., et al., 418 F.2d 163 (7th Cir. 1969); *In re Stolar*, 401 U.S. 23 (1971); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); and *Procunier*, etc., et al. v. *Martinez*, et al., 416 U.S. 396 (1974).

[85] *Lanzetta*, et al. v. *New Jersey*, 306 U.S. 451 (1939).

[86] *Griswold*, supra at note 43, at 486.

cision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[87]

"Where a statute's literal scope, unaided by a narrowing state court interpretation," may impinge upon basic fundamental rights, due process "demands a greater decree of specificity than in other contexts."[88]

In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972) this Honorable Court formalized several standards of the "void for vagueness" doctrine.

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' "

The effect of such indefiniteness, uncertainty and vagueness in the present legislation will be to produce differing interpreta-

[87] *National Association for the Advancement of Colored People* v. *Button*, etc., et al., 371 U.S. 415, 438 (1963).

[88] *Smith*, etc. v. *Goguen*, 415 U.S. 566, 573 (1974).

tions from physician to physician, hospital to hospital, and city to city within the State of Missouri; as well as to impose an additional discriminatory burden upon the indigent woman, who cannot afford the luxury of shopping for a favorable and acceptable interpretation within her state's medical community.[89]

c. **Overbreadth.**

(i) **Invalid, irrebutable presumptions.**

The incorporation by many of the challenged Sections of "irrebutable presumptions", which are, in fact, refutable and whose underlying principles are baseless and unwarranted, has been frequently prohibited as a violation of due process.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence

[89] For the additional burdens confronting the indigent woman in Missouri, see *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975), and *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[90]

The prohibition against the incorporation into statutes of unwarranted presumptions has been reaffirmed in prior, related cases dealing with sexual (gender) preferences,[91] illegitimacy of children[92] and pregnancy.[93] When governmental action "rests on an irrebutable presumption often contrary to fact . . . (i)t therefore lacks critical ingredients of due process."[94] It has been suggested that such presumptions may be a parameter and/or a surrogate of equal protection, as well as of due process.[95]

A finding as to the unconstitutionality of the invalid presumptions of the challenged Sections would not be inconsistent with this Honorable Court's recent decision in *Weinberger*, etc., et al.

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[90] *Stanley* v. *Illinois*, 405 U.S. 645, 656-657 (1972).

[91] *Reed* v. *Reed*, etc., 404 U.S. 71 (1971); *Frontiero* et vir v. *Richardson*, etc., et al., 411 U.S. 677 (1973); and *Weinberger*, etc. v. *Wiesenfeld*, 420 U.S. 636 (1975).

[92] *Stanley*, supra at note 90; *Jiminez*, et al. v. *Weinberger*, etc., 417 U.S. 628 (1974); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization*, et al. v. *Cahill*, etc., et al., 411 U.S. 619 (1973); and *Lucas*, et al. v. *Secretary*, etc., 390 F.Supp. 1310 (D.R.I. 1975).

[93] *Cleveland Board of Education*, et al. v. *LaFleur*, et al., 414 U.S. 632 (1974); and *Andrews*, et al. v. *The Drew Municipal Separate School District*, et al., 507 F.2d 611 (5th Cir. 1975).

[94] *United States Department of Agriculture*, et al. v. *Murry*, et al., 413 U.S. 508, 514 (1973).

[95] Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L.REV. 800 (1974); and Case Comment, *Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis*, 58 MINN. L. REV. 965 (1973-1974).

v. *Salfi*, et al., —U.S.—(1975). The discrimination and denial of equal protection at issue herein does operate harmfully against a "politically unpopular group", does not bear a "rational relation to a legitimate legislative goal" and cannot be justified as the "inherent imprecision of a prophylactic rule." *Id.*

(ii) **Narrowly drawn legislation.**

A second test of overbreadth is the requirement that "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake".[96] All of the challenged Sections extend far beyond this established judicial limit.

d. **Inherent bias and conflict.**

The challenged Sections provide no official means by which a physician or patient can obtain an adequate and timely administrative decision on the legality of any particular abortion. Under the challenged statutory scheme, the individual physician or a hospital committee, must decide whether a particular abortion may be legally performed. The individual physician and possibly other employees of a hospital, are subject not only to criminal prosecution but also to license revocation,[97] if they retrospectively prove incorrect in their interpretation of the Sections.[98]

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[96] *Roe* at 155; and *The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 86 (1974). See, *United States Department of Agriculture*, et al. v. *Moreno*, et al., 413 U.S. 528 (1973).

[97] Section 12. See, MO.REV.STAT., Section 334.100, subsections 1(3), (4) and (8).

[98] The possibility of such sanctions is no mirage, as was shown in California when nine physicians were brought up on disciplinary charges for performing hospital committee approved abortions in

Moreover, physicians are constrained by the legislative binds to take into account a host of factors, many arbitrary and wholly unrelated to the woman's health and personal needs. The resulting situation deprives the woman and her physician of due process of law, in that she cannot obtain an impartial consideration of her application for an abortion. This was recognized by the Supreme Court of California as an alternate ground for its decision in *The People* v. *Belous*.[99] The failure of due process herein logically follows from decisions by this Honorable Court and several appellate circuits where claims of inherent bias have been sustained, both in the criminal[100] and administrative law[101] areas. Judicial condemnation of such inherent bias, moreover, has antecedents as far back as decisions in the 1500s.[102]

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cases of German measles. See, *Shively*, et al. v. *Stewart*, 65 Cal. 2d 475 (1966), 421 P.2d 65, 55 Cal. Rptr. 217, *on remand* (No. 590333, Cal.Super.Ct., San Fran. Cty., Sept. 24, 1968) (not reported). Witness, also, the recent conviction of Dr. Kenneth Edelin in Boston, Mass. on February 15, 1975 following a six-week trial, in which first named counsel herein acted as co-counsel for defendant Edelin during trial. *Commonwealth* v. *Edelin* (Suffolk County Superior Court, No. 81823, Feb. 15, 1975) (appeal pending).

[99] 71 Cal.2d 954, 972-973 (1969), 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366, *cert. denied*, 397 U.S. 915 (1970).

[100] See, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Witherspoon* v. *Illinois*, et al., 391 U.S. 510 (1968) (biased jury); *In re Murchison*, et al., 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[101] See, *e.g.*, *Gibson*, et al. v. *Berryhill*, et al., 411 U.S. 564 (1973) (bias of hearing board); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, et al., 393 U.S. 145 (1968) (bias of arbitrator); *United States* ex rel. *Accardi* v. *Shaughnessy*, etc., 347 U.S. 260 (1954) (bias in deportation proceedings).

See, generally, Davis, *Administrative Law Text*, Sections 12.01-12.06, pp. 245-253 (3rd Ed. 1972); and Comment, *Prejudice and the Administrative Process*, 59 NW.U.L.REV. 216 (1964).

[102] See, *Vernon* v. *Manners*, 2 Plowd. 425, 75 Eng. Rep. 639 (K.B. 1572); and *Bonham's Case*, 8 Coke 114, 77 Eng. Rep. 646 (K.B. 1610).

The facts which illustrate unconstitutional bias here are accentuated by the vagueness of the statute, its varying interpretations from hospital to hospital and from physician to physician, and the total absence of any regularized procedure or guidelines endorsed by the State.

Put simply, the physicians in the first instance, and the hospitals later "have completely free rein to decide the law as well as the facts. . . ."[103] The former have their liberty, medical licenses and reputations to lose, if they decide in the woman's favor.[104] If the physicians are primarily concerned with their own self-interests and refuse their patients' requests they face no liability. They may even mislead the patient as to the truth of her circumstances.[105]

The system could hardly be more rigged against the woman. She and her medical advisors are forced to become adversaries because of the threat of the statute. This is a far more serious violation of due process, for example, than prior (administrative) official involvement in ascertaining the facts of a case, *Wasson* v. *Trowbridge*, etc., et al., 382 F.2d 807, 813 (2d Cir. 1967) (student disciplinary proceeding), for here the physicians have a great deal more than mere medical facts on their minds.

This grave deprivation of due process, guaranteed physicians and their patients under the Fourteenth Amendment, has been recognized in the abortion context,

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[103] *Commonwealth Coatings Corp.*, supra at note 101, at 149.

[104] For the effect and implications of the *Edelin* decision, supra at note 98, on the delivery of services, see *Doe*, et al. v. *Nassau County Medical Center*, et al., — F.Supp. — (E.D.N.Y. 1975).

[105] See, *Gleitman*, et al. v. *Cosgrove*, et al., 49 N.J. 22 (1967), 227 A.2d 689. See, also, *The State* v. *Anderson*, 298 Mo. 382, 386 (1923), 250 S.W. 68, 69, in which the patient had attempted to self-abort by use of a catheter and had informed her personal physician "that if he would not relieve her she would find some one who would; that she would rather die than go through childbirth again." Her personal physician "(i)n order to ease the woman's mind . . . told her that she was not pregnant." She consequently sought out the defendant, a physician.

"In the final analysis, plaintiff-physicians who may be threatened with prosecution under the abortion statute can rely only upon their individual judgment, always subject to a judicial determination that they guessed wrongly, and to resulting conviction and loss of license to practice medicine. As Justice Clark has observed:

> 'The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion.' "[106]

4. **Equal protection.**

A law that selects out for treatment an identifiable class of citizens and then curtails basic rights of that class, results in both the class and the law being defined as "suspect".[107] Such laws may only be sustained by reason of an "overriding statutory purpose",[108] a "pressing public necessity"[109] or a "compelling state interest"[110] and the state must shoulder the "very heavy burden of justification".[111]

a. **Abortion as a legislatively non-favored choice.**

Closely aligned with the "extra layer of regulation" prohibition, discussed supra,[112] are the specific legislative schemes

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[106] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler, etc.*, 342 F.Supp. 1048, 1066 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

[107] *Loving*, et ux. v. *Virginia*, 388 U.S. 1, 11 (1967).

[108] *McLaughlin*, et al. v. *Florida*, 379 U.S. 184, 192 (1964).

[109] *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944).

[110] *Roe* at 155.

[111] *Loving*, supra at note 107, at 9.

[112] *See*, IIB1b, supra at 37.

which unconstitutionally favor a woman's election to carry a pregnancy to term as opposed to terminating the pregnancy.

Roe clearly held that the decision to abort was a matter of privacy encompassed within the spectrum of a fundamental right.[113] Where fundamental rights, involving abortion[114] or other forms of contraception,[115] are involved, "it is impermissible to treat differently two classes which do not differ on any ground related to the purpose of the challenged statute."[116]

The invalidity of legislation which favors childbirth over abortion has been unanimously adopted in an unbroken line of authority voiding Medicaid statutes, which exclude payment for abortion[117] and voiding public hospital policies, which exclude abortion procedures.[118]

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[113] *Roe* at 155.

[114] *Doe* at 194.

[115] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

[116] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health, et al.*, 505 F.2d 1141, 1152 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[117] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan*, etc., v. *Klein*, et al., 412 U.S. 924 (1973); *Doe*, et al. v. *Rose*, etc., 380 F. Supp. 779 (D.Utah 1973), *affirmed*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973); *Doe*, et al. v. *Wohlgemuth*, et al., 376 F.Supp. 173 (W.D. Penn. 1974), *affirmed on other grounds* sub nom. *Doe*, et al. v. *Beal*, etc., et al., — F.2d — (3rd Cir. 1975); *Doe* et al. v. *Westby*, et al., — F.Supp. — (D.S.D. 1975); *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975); *Doe*, et al. v. *Myatt*, et al., — F.Supp. — (D.N.D. 1975); and *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D. Pa. 1975).

[118] *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975). See, *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975).

As so aptly stated by one Court,

> "The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance."[119]

The economic "medical assistance" which formed the basis for unconstitutional discrimination by the State in *Klein*, supra, is indistinguishable from the discriminatory legislative encumbrances in the present cause. In each of the challenged Sections, the State of Missouri has preferred childbirth over abortion by encumbering in discriminatory fashion the latter.

As the Court in *Klein*, supra, went on to note,

> "Beyond that, it may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child."[120]

The herein challenged Sections deny to pregnant women desiring to abort the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to statutory coercion to bear children, which they have no desire to bear or to raise; while women desiring to bear children are not similarly coerced. In fact, women desiring to give birth are given complete freedom to choose their favored alternative, influenced only by the multitude of individual considerations which directly and relevantly bear upon the problem, unstructured and unimpeded by state action.

The rights to use contraception[121] or to terminate a pregnancy[122] as pronounced by this Honorable Court, are neither

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[119] *Klein*, supra at note 117, at 500.

[120] *Ibid.*

[121] *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); and *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972).

[122] *Roe* and *Doe*.

less nor more equal than the rights to beget[123] and to raise children.[124] Parenthood or non-parenthood is a matter of individual privacy and,

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125]

The state has no legitimate interest in favoring parenthood in its citizens. The State of Missouri has never advanced a legitimate reason for such a position in this cause. The three reasons advanced by the State of Texas in defense of its restrictive abortion statute, "illicit sexual conduct",[126] safe "medical procedure"[127] and "protecting prenatal life"[128] were all discounted and refuted in *Roe*.[129]

b. **The socio-economic discrimination.**

Any statutory encumbrances which restrict access to an abortion, disproportionately compound the availability of abortion for indigent women. Economically advantaged women, more readily able to afford the luxuries of private physicians, have the means and access to more favorable statutory interpretations affording compliance with and medical treatment under the challenged Sections.

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[123] *Skinner* v. *Oklahoma* ex rel. *Williamson*, etc., 316 U.S. 535 (1942).

[124] *Pierce*, etc., et al. v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

[125] *Eisenstadt*, supra at note 121, at 453.

[126] *Roe* at 148.

[127] *Ibid.*

[128] *Id.* at 150.

[129] *Id.* at 148-152.

On their face, the challenged Sections make no distinction on the basis of a patient's race, economic status or social position. Yet, as applied, these and similar statutes have systematically come to deny safe medical abortions to the poor and to other minority groups. Moreover, illegal abortions and their concomitant incidents of morbidity and mortality appear to occur largely among the economically deprived sectors of our society. Several scholarly studies from the medical literature thoroughly document this discrimination.

The "Gold study"[130] covers the 1943 to 1962 period in New York City. Gold showed that from 1960-1962, for example, 55.6% of the puerperal deaths among the Puerto Rican population were due to abortion. In the same period 49.4% nonwhite puerperal deaths had the same cause, but among whites the figure was only 25.2%. In other words, well over half of the deaths associated with child-bearing of Puerto Rican women, and one-half of the same kinds of deaths of nonwhite women came from bungled abortion.[131]

Not only did Puerto Rican and nonwhite women get the worst nonmedical abortions, but they received very few of the abortions granted by hospital committees. The Gold study further revealed that white women obtained 92.7% of the hospital abortions granted in 1960 to 1962, as contrasted with 0.9% Puerto Rican and six and four-tenths percent nonwhite. Whites received $103 \frac{(92.7)}{(0.9)}$ times as many abortions as Puerto Ricans and $14.5 \frac{(92.7)}{(6.4)}$ times as many as nonwhites.[132] While no data

[130] Gold, *et al.*, *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM.J.PUB.HEALTH 964 (1965).

[131] *Id.* at 965, at Table 1.

[132] *Id.* at 966, at Table 3.

specifically on Missouri are available in the medical literature, one can infer a similar pattern from these local and nationwide studies.

Two studies of hospitals across the United States reveal the same pattern of discrimination against indigent ward patients. A 1965 study by Dr. Robert E. Hall, of 60 major American hospitals revealed that the abortion/delivery ratio for private patients was three and six-tenths times higher than that for ward patients.[133] Similarly, a 1968 study by Dr. Christopher Tietze[134] dealt with the ethnic characteristics of aborted patients and the indications for hospital therapeutic abortions at several hundred American hospitals which participate in the yearly Professional Activities Survey.[135] Thirty-four percent of the abortions counted in the survey were done for "psychiatric" indications.[136] And, "the incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group."[137]

In the two Missouri hospitals included in Hall's study, supra, St. Louis Maternity (Barnes) and The University of Missouri Medical Center at Columbia, the ratio of combined abortions to deliveries among private patients was 1:1,426 and among ward patients was 1:3,515; two and one-half times as high among the former as the latter. There is no reason to suspect that the results of studies elsewhere in the United States differ in any sig-

[133] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 AM.J.OBSTET. AND GYNECOL. 518, 524-525 at Table VI (1965).

[134] Tietze, *Therapeutic Abortions in the United States*, 101 AM.J. OBSTET. AND GYNECOL. 784 (1968).

[135] These hospitals numbered "269 in 1963, 321 in 1964, and 384 in 1965." *Id.* at 784.

[136] *Id.* at 785, at Table I.

[137] *Id.* at 786.

nificant manner from conditions and circumstances here in Missouri, even today, as shall appear, infra.

This discrimination, it should be noted, is not the inevitable result of unequal distribution of societal wealth. It is the product both of governmental action and inaction. Public hospitals simply do not provide the desired access to abortion on the same scale as do private institutions. Except in cases where abortion would be deemed necessary to save a patient's life, to a greater or lesser degree, the public hospital does not provide full informational, diagnostic and treatment facilities to the indigent patient.[138]

Perhaps no other factor has played so great a role in recent changes in abortion laws, as the unquestionable realization that abortion had always been freely available, virtually upon request, to those with means. Medical abortions continue, however, to be all too frequently beyond the reach of the poor, and they consequently turn to local quacks, midwives, plumbers and even worse. The result is the paradox that can be found in any large metropolitan hospital. Wealthy women enter the front door of the private hospital or facility. They receive a medical abortion under the finest of conditions. The poor woman enters the hospital through the back door, often on the verge of death. She has had a septic abortion which has caused serious infection, bleeding and, on occasion, death.[139] The hospital authorities complete this abortion and administer antibiotics, transfusions and intense care. The impoverished woman remains several days and may recover, at considerable cost to the State. The wealthy woman has paid her bill and has left after a brief stay.

[138] See, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 39, at Table Y, indicating that only 15% of the nation's public hospitals were providing abortions by the first quarter of 1974.

[139] See, The St. Louis *Post Dispatch*, June 10, 1975, at 1 and 8.

State acquiescence in the hundredfold recurrence of this paradox is the cause of this socio-economic discrimination. A decision by this Honorable Court would swing open wide the front door to the impoverished woman and eliminate much of the incontrovertible discrimination complained of herein.

If the Missouri statute expressly limited the number of abortions for ward and indigent patients, or, if the rules of a particular hospital so provided, the statute on its face would be unconstitutional. It has repeatedly been said, " 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards* v. *California*, 314 U.S. 160, 184-185 (1941) (concurring opinion of Mr. Justice Jackson). In the abortion context, however, indigency is a relevant, indeed a crucial factor. Arguably it is the only factor. All of the challenged Sections serve to thwart the poor in their access to a medical procedure—abortion—which is commonly available to those with funds and contacts.

In recent years, the Supreme Court has focused upon laws which in effect discriminate against individuals because of poverty. In *Griffin*, et al. v. *Illinois*, 351 U.S. 12 (1956), two indigent defendants could not appeal as otherwise they could have of right under Illinois law, because they could not afford a needed trial transcript. The state statute made such transcripts equally available to all who could pay the required fee. While recognizing that the Constitution does not necessarily require any appellate review, this Honorable Court held that once a state grants review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."[140]

The Court stated,

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or in-

[140] 351 U.S. at 18.

nocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[141]

Harper, et al. v. *Virginia Board of Elections*, et al., 383 U.S. 663 (1966), a decision dealing with the poll tax, also illustrates this Honorable Court's concern with the effect of poverty upon the exercise of fundamental personal rights. In declaring the Virginia poll tax of $1.50 per person unconstitutional under the equal protection clause, this Honorable Court emphasized that the right of suffrage is a fundamental one in a free society. The State had pointed out that it exacts fees for many purposes from its citizens. In reply to this argument this Honorable Court said,

"Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause."[142]

While *Griffin*, supra, involved the criminal process, and *Harper*, supra, the vote, plaintiffs are asserting rights of equal constitutional stature, and in an area of human behavior of equal importance. As the Supreme Court stated with reference

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[141] *Id.* at 18-19. See, also, *Douglas*, et al. v. *California*, 372 U.S. 353 (1963).

[142] 383 U.S. at 668.

to privacy in *Griswold*, supra, "(w)e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[143]

Equal protection concepts have matured in recent years. States are being required to take steps to remove criminal, civil and administrative inequities which are not directly the State's creation. Thus in the circumstances present in *Griffin*, supra, and *Douglas*, supra, and their progeny, the indigent were to be provided respectively with free transcripts and free appellate counsel; in *Harper*, supra, no person could be required to pay a poll tax. Indigency and financial burdens have similarly been held void when used to prevent candidacy for public office.[144]

Commentators have pointed to this emphasis "upon measures the states adopt in carrying on their activities and steps they must take to offset disabilities not of their creation,"[145] and have discussed this trend in relation to traditional equal protection theory.[146] What emerges is a requirement that the state give "attention to those inequalities for which it is not directly responsible, but which nevertheless are concomitant features of the existence of the organized state," and "adopt a standard of proportional equality which takes account of the

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[143] *Griswold*, supra at note 421, at 486.

[144] *Lubin* v. *Panish*, etc., 415 U.S. 709 (1974); and *Bullock*, et al. v. *Carter*, et al., 405 U.S. 134 (1972).

[145] Cox, *THE SUPREME COURT 1965 TERM Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV.L.REV. 91, 93 (1966).

[146] See, generally: Michelman, THE SUPREME COURT 1968 TERM Forward: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV.L.REV. 7 (1969); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964); and Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV.L.REV. 435 (1967).

differing needs of its citizens, whenever those needs stand in the way of equal access to the basic resources of national life."[147]

Analogously, indigents have been granted access to the courts for dissolution of their marriages,[148] marriage being a fundamental right involving privacy.[149]

While it is true that not every inequality constitutes a denial of equal protection, basic rights are involved here and under the present system the lives and the health of poor patients are drastically affected through the denial of proper medical care, free from the rigors of the State's moral strictures.

What was said by Mr. Justice White in his concurring opinion in *Griswold*, supra, is equally applicable here,

> "(T)he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535 . . ."[150]

In *United States v. Vuitch*,[151] the District Court discussed this claim briefly,

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[147] *Developments in the Law Equal Protection*, 82 HARV.L. REV. 1065, 1189-1190 (1969).

[148] *Boddie*, et al. v. *Connecticut*, et al., 401 U.S. 371 (1971).

[149] *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967).

[150] 381 U.S. at 503.

[151] 305 F.Supp. 1032 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971).

> "National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately."[152]

The exaggerated effect of restrictive abortion legislation upon the poor has been recognized in Medicaid cases, specifically applicable to indigents,[153] and in public hospital cases, not specifically applicable to indigents.[154]

In the instant case, as in *Griswold*, supra, and *Vuitch*, supra, the statutes in question have resulted in a discrimination against the poor. It should not matter whether or not the discrimination was the result of a conscious state policy, for the State has consciously adopted and retained abortion legislation which inexorably leads to the systematic socio-economic discrimination described. The challenged Sections should be struck down for the additional reason that they lead to unjustifiable discrimination against the poor, in violation of the equal protection clause of the Fourteenth Amendment.

III. Section 2(2)—The Definition of Viability.

Challenged Section 2(2) of the Missouri statute seeks to codify the definition of "viability" as,

> "(T)hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;"

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[152] *Id.* at 1035.

[153] *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211, 1215-1216 (8th Cir. 1974), *limited cert. granted*, — U.S. — (1975).

[154] *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

The definition becomes critical when relied upon for the subsequent application of Section 5 providing,

> "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable."

Section 5, although facially similar to the state's limitation upon late abortion permitted by this Honorable Court after the period of viability,[155] survives or falls with the determination of Section 2(2)'s constitutionality; since it is wholly dependent upon the challenged statutory definition of "viability."

A salient distinction lies in this Honorable Court's definition of viability, variously as: "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks;"[156] the time "the fetus then presumably has the capability of meaningful life outside the mother's womb;"[157] and when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[158]

Section 2(2) through its crucial reliance upon the term "indefinitely" places every physician during every pregnancy treated at the risk of complying with the requirement of Section 5 at the peril of criminal sanctions.[159] By the omission of any reference to a gestational time period, the possibility, although slight, that a fetus might be capable of surviving for an indefinite number of moments or minutes, always exists.

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[155] *Roe* at 162-164.

[156] *Id.* at 160.

[157] *Id.* at 163.

[158] *Id.* at 160.

[159] See, Section 14 and IIB3b, supra at 41.

This Honorable Court's parameters of the "compelling" point, in terms of definite weeks and "meaningful" extra-utero existence, connotes a life not measured in breaths or heartbeats. Any living fetus might well have the capability, if removed by abdominal hysterotomy, to survive for an indefinite period.[160]

While the distinction may appear subtle, it is one of great significance. A recent effort by the Minnesota legislature providing similarly that, " 'Viable' means able to live outside the womb even though artificial aid may be required" was unanimously found unconstitutional by a three-judge federal panel in *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D. Minn. 1974). There the Court said,

> "In its historical review of the abortion dilemma, the Supreme Court in *Roe* said:
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> 'Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.' 410 U.S. at 160, 93 S.Ct. at 730."
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> "Even accepting the lesser of these figures, 24 weeks of pregnancy is still within the second trimester or that stage subsequent to the first trimester, but prior to viability. Using 24 weeks as the earliest point of viability places a decision to terminate pregnancy between 20 and 24 weeks in the second part of the *Roe* test. Thus at any point prior to 24 weeks and subsequent to approximately the end of the first trimester, the state may regulate only insofar as such regulations are related to maternal health."
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> "We do not accept the suggestion of the defendants that the Supreme Court's comment on viability was only

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[160] It is naturally assumed, although not definitely ascertainable, that the use of "indefinite" does not synonymously imply "infinite", requiring immortality.

dicta. It appears to this Court that after reviewing the historical, medical, and legal attitude on abortions, the Supreme Court concluded that as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician. In any event, under present technology, it does not arise prior to 24 weeks. It appears that the Court made its comments on viability to prevent the very thing that has happened here, which is the attempt to set viability by legislative definition and thereby, in effect, unreasonably interfere with what the Court has determined to be a fundamental right."

"Except in the context of its right to generally regulate professional standards relating to the practice of medicine, any attempt to regulate abortion prior to viability is unconstitutional unless the regulation is for the period after the approximate end of the first trimester and is reasonably related to the woman's health. The Minnesota definition of viability as found in Section 145.411, Subd. 2 and Section 145.413, Subd. 1 of the Minnesota Statutes is unreasonable and cannot stand."[161]

In *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973), a unanimous three-judge federal panel held unconstitutional legislation regulating abortion on the basis of viability defined as "any reasonable possibility of survival outside its mother's womb." (Utah Code Ann., Title 76, Chapter 7, Sections 76-7-302(3) and 76-7-310). The Court stated,

> "Section 76-7-302(3) is too broad a regulation and invalid because it might apply in any trimester of pregnancy, . . ."
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> . . .

[161] 378 F.Supp. at 1016.

> . . . "76-7-310 [is] invalid because [it] might apply in any trimester. . . ." 366 F.Supp. at 192-193.

The constitutional limitations upon the state in restricting viability prompted one federal Court to hold,

> 'Viability cannot be determined by the state; the decision is a medical one and must be left to the professional medical judgment of the woman's physician just as in any other medical procedure."[162]

A similar legislative attempt to define viability as "the capability of a fetus to live outside the mother's womb albeit with artificial aid"[163] was voided by a Pennsylvania federal panel.[164] The Court held,

> "We believe that a preponderance of the evidence supports a finding that there is not a consensus within the medical community as to the gestational age at which viability occurs. Moreover, viability as defined in the Act, without reference to gestational age, is confusing even to members of the medical profession.
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> . . .
>
> We find that the Supreme Court in *Roe* intended to set the lowest limit at which viability may be deemed to occur at the 24 week period."[165]

The Court continued by discussing the "may be" language of the Pennsylvania Act, which discussion is equally applicable to the "may be" language of this challenged Section.

[162] *Wolfe*, supra at note 59, at 637.

[163] PENN.ACT No. 209, Section 2.

[164] *Planned Parenthood Association*, supra at note 117.

[165] *Id.*, slip opinion at 24, 28.

"In addition to challenging the definition of viability as being vague, plaintiffs also challenge the right of the legislature to regulate the procedure used where the fetus 'may be viable', as evidenced by the language of Section 5(a) and enforced by Section 5(d) of the Act. *Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably has the capability of meaningful life outside the mother's womb. Consequently, *Roe* recognizes only two periods concerning fetuses. The period prior to viability, when the state may not regulate in the interest of fetal life, and ~~the period~~ after viability, when it may prohibit altogether or regulate as it sees fit. The 'may be viable' provision of Section 5(a) tends to carve out a third period of time of potential viability. . . . It is clear that in carving out this new time period labeled 'may be viable' the state is regulating abortions during the second trimester, when it may lawfully do so only in the interest of maternal health. Yet the state does not claim the provision to be in the interest of maternal health, nor has it shown any connection between this provision concerning fetuses which 'may be viable' and maternal health. Clearly, the state seeks to justify this provision only as a measure in furtherance of its claimed interest in protecting potentially viable fetuses. Since this provision does not meet the requirements of *Roe*, we declare it to be unconstitutional."[166]

Similarly holding that 24 weeks is the minimum gestation for viability and that the language of this Honorable Court to that effect was not *dicta*, is *Leigh* v. *Olson*, etc. et al., 385 F. Supp. 255, 260-261 (D.N.D. 1974).

[166] *Id.*, slip opinion at 29-30.

State courts prior to *Roe* and *Doe*, variously but uniformly provided,

> "[T]he expression 'viable fetus' means the child has reached such a state of development that it can presently live outside the female body as well as within it. A fetus generally becomes a viable child between the sixth and seventh month of its existence, although there are instances of younger infants being born and surviving."[167]

It is evident that viability has been used by the courts to denote a probability of survival and not the possibility (even to the extreme of remoteness), as envisioned by the challenged Section through its incorporation of "indefinitely". The mere possibility of momentary survival is not the medical standard of viability and constitutionally cannot be the legal standard of viability.

In the most thorough and complete medical review yet compiled, Behrman and Roven[168] interpolate from available data that a fetus of 25 weeks removed from the uterus has a probability of survival, when compared to the total population of births, no better than 3.6 parts in 1,000,000.[169] This is the nature of the statistical information available to the physician at the time the medical decision to terminate pregnancy is made.

The Misssouri legislature has not and could not grant to physicians the foresight to determine the meaningful or probable survivability of any particular fetus, prior to the completion of uterine extraction or expulsion. Fetuses which experienced meaningful survival following a live birth, represented approximately

[167] *Mitchell*, etc. v. *Couch*, 285 S.W.2d 901, 905 (Ky.Ct.App. 1955). See, also: *Rainey*, et al. v. *Horn*, 221 Miss. 269, 283 (1954), 72 So.2d 434, 439-440; and *Hall*, etc. v. *Murphy*, 236 S.C. 257, 263 (1960), 113 S.E. 2d 790, 793.

[168] Behrman, *et al.*, *Report to the National Commission for the Protection of Human Subjects*, U.S. PUBLIC HEALTH SERVICE (March 1975).

[169] *Id.* at 12.

seven percent at 25 weeks gestational age, 17% at 26 weeks, 44% at 27 weeks and 50% only during the middle of the 28th week.[170] For a physician to be held accountable to the standard of possible survivability, the physician has no alternative but to allow birth in each case to occur. Such a posture is highly reminiscent of the colonial practice of proving the innocence of accused witches by their drowning.

To allow a standard of possible, evanescent survival is to provide no meaningful statutory guide. Viability, as used in this Honorable Court's decisions of *Roe* and *Doe*, must be interpreted to restrict the state's prohibition of abortion to that period of gestation, when by reasonable medical judgment, the fetus, if then born, has the probability of meaningful survival. To allow the conviction of a physician based upon the mere possibility of ephemeral extra-uterine survival, not only violates this Honorable Court's directives of *Roe* and *Doe*, but raises serious questions of criminal prosecution embodied in *Mullaney*, et al. v. *Wilbur*, — U.S. — (1975). As recently noted by a three-judge dissent within the Massachusetts Supreme Judicial Court,

> " 'There is of course no virtue in "viable" as a criterion . . . It is in any case a very unsatisfactory test. It is very difficult to prove, and is usually a matter of medical guess. Viability is a relative matter, depending not only upon the age of the fetus, but upon many other factors, such as the health of the mother.' Restatement 2d: Torts, Section 869 (Tent. Draft No. 16, April 24, 1970, p. 174)."[171]

Birth during the sixth lunar month (24-27 weeks) produces a fetus which "almost always dies shortly after birth"[172] and

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[170] *Id.*, figure 6 at 14.

[171] *Mone*, etc. v. *Greyhound Lines, Inc.*, et al., — Mass. — (1975), 331 N.E.2d 916, 923.

[172] Hellman, WILLIAMS OBSTETRICS, Appleton-Century-Crofts (1971), at 200.

birth during the seventh lunar month (28-31 weeks) produces an infant which "usually . . . succumbs, but occasionally, with expert care . . . may survive."[173]

In a recent study which received national news coverage due to its implications upon the abortion debate, Dr. Dominick P. Purpura of the *Rose F. Kennedy Center for Research in Mental Retardation and Human Development* at the Albert Einstein College of Medicine noted that "[r]elatively few preterm infants spontaneously aborted at 25 weeks g.a. survive even with the most vigorous attempts at intensive care."[174] Dr. Purpura concludes that the survival of preterm infants is substantially related to the functional status of the cerebrum.

> "3. The development of dentritic spines between 28 to 33 weeks represents a critical phase in the structural maturation of synaptic organizations in human primary visual cortex."[175]

The logical conclusion is that,

> "Unless *Roe* also circumscribes judicial inquiry into a physician's decision about whether a particular fetus is viable . . . the doctor would undoubtedly prefer to err on the side of safety by refusing to perform elective abortions past a very early gestational age to avoid the danger of a criminal prosecution."[176]

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[173] *Id.* at 202.

[174] Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant*, GROWTH AND DEVELOPMENT OF THE BRAIN, Raven Press, New York: 1975, at 34.

[175] *Id.* at 46.

[176] Sendor, *Medical Responsibility for Fetal Survival Under* Roe *and* Doe, 10 HARV. CIVIL RIGHTS—CIVIL LIBERTIES L. REV. 444 (1975), 454 at note 57.

To the greatest degree possible, the sound medical judgment of the responsible physician needs to be insulated from the spectres of prosecutorial zeal and personal predilections of jurors.[177]

This challenged Section 2(2) directly interferes with the First Amendment protections afforded to physicians and patients,[178] utterly fails to distinguish between the various gestational stages as to its applicability[179] and completely ignores the protective, safeguards of "judicial and intra-professional" remedies referred to and relied upon by this Honorable Court.[180] Medical decisions are properly made when based upon anatomical and scientific facts. Medical decisions are incapable of proper determination when ill-laid upon a Procrustean bed constructed of legislatively defined facts and circumstances.

IV. Section 3(2)—The Requirement of the Patient's Written, Certified Consent.

This challenged Section 3(2) required that prior to the abortion procedure, the patient must certify in writing that she consents to the procedure and that her consent is informed, freely given and is not the result of coercion.

On its face this requirement intrudes upon the First Amendment rights of physicians and patients[181] and impermissibly applies to every stage of pregnancy.[182] Section 3(2) has singled out abortion and has statutorily impinged upon the confidential trust of the doctor-patient relationship in a manner not applicable to

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177 See, IIB3d, supra at 47.

178 See, IIA1, supra at 28.

179 See, IIB1a, supra at 37.

180 *Roe* at 166.

181 See, IIA1, supra at 28.

182 See, IIB1a, supra at 37.

any other medical or surgical procedure. By definition it injects into that relationship suspicion, concern and doubt by the inference that an uninformed, duressed or coerced consent may occur in the absence of such certification.

In *Hodgson*, supra, an unanimous three-judge panel voided a recent Minnesota statute making abortions unlawful unless,

> "(4) with the consent of the woman submitting to the abortion after a full explanation of the procedure and effect of the abortion." (MINN. STAT., Section 145.412, Subdivision 1[4]).

The Court stated,

> "To the extent these regulations apply to any abortion performed in the first trimester, they are unconstitutional. The two provisions relating to informed consent (§ 145.412, Subd. 1(4) and § 145.412, Subd. 2) are objectionable in that they single out the abortion procedure and are simply unnecessary to protect either the woman's health or the health of the unborn. . . . The decision to terminate a pregnancy if made prior to viability is one which must be left to the woman and her physician, except for the limited state involvement in the second stage. By leaving the decision to those intimately involved, the Supreme Court has placed first and second stage abortions in that realm of medical judgment attendant to any health or medical procedure. In the matter of consent, as dealt with in these two provisions, physicians and patients involved in a first or second stage abortion should not be held to any more stringent regulation than is normally placed on the practice of medicine. The abortion question in these stages must be resolved by the patient and by the physician based upon the exercise of his professional judgment. There is no reason to suspect he would do otherwise."[183]

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183 *Hodgson*, supra at note 69, at 1017.

Written consent by the woman for an abortion was similarly invalidated in *Wolfe*, supra,

> "*Section 4*. This is the written consent provision. The section provides that the woman must, in all cases, give her written consent to the abortion. This requirement fails to meet constitutional scrutiny in that it is overbroad; it intrudes into the decision-making process and includes the first trimester where the state has no compelling interest. *Roe* clearly holds that the states cannot affect the first trimester period in any way through its regulations."[184]

This challenged Section also suffers from the flaw of vagueness[185] through its use of "informed" as describing the required consent. Informed consent is "in any event . . . a medical judgment", requiring in malpractice cases expert testimony in order to present a submissible case.[186] The Section fails to specify the nature of the information required to be given by the patient before her consent may be considered informed. Does it consist of data as to the actual procedure and its methodology, as to the potential risks and attendant dangers, as to the alternatives to abortion, as to the methods and risks of such alternatives or as to what any particular jury in retrospect might consider as necessary to constitute an "informed consent"?

V. Section 3(3)—The Requirement of Spousal Consent.

This Honorable Court in *Roe* did not "discuss the father's rights, if any exist in the constitutional context, in the abortion decision"; because, the issue not being then directly presented,

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[184] *Wolfe*, supra at note 69, at 636.

[185] See, IIB3b, supra at 41.

[186] *Aiken*, etc. v. *Clary*, 396 S.W.2d 668, 675 (Mo. 1965). The concept of "informed consent" is a legal nicety, the absence of which appears not to be subject to criminal sanctions in any other phase of medical practice.

there was then no need to "decide whether provisions of this kind are constitutional."[187]

Nevertheless, plaintiffs contend here that the meaning and intent of this Honorable Court's decisions in *Roe* and *Doe* unquestionably prohibit a statutory requirement of written, spousal consent.

This challenged Section blatantly affronts the holding of *Roe* that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[188] It is not merely the concept of spousal consent which is void, but the state's requirement of the same, *per se*, and its cumulative effect and enforcement in application. *Shelley*, et ux. v. *Kraemer*, et ux., 334 U.S. 1 (1948), *et seq*.

Subjecting the medical decision of abortion to the approval of a married woman's spouse impermissibly intrudes into the First Amendment rights of medical advice and treatment between a physician and patient.[189] No other statute, criminal or otherwise, requires the additional consent of a spouse, or any specific, third party in regard to any other known medical or surgical procedure,[190] with the constitutionally questionable, statutory exceptions in Georgia, New Mexico and Virginia for female sterilization.[191]

The requirement of spousal consent, by the terms of this challenged Section, leaves no room for any exception to or

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[187] *Roe* at 165, at note 67.

[188] *Id*. at 163.

[189] See, IIA1, supra at 28.

[190] See, IIB1b, supra at 37.

[191] See GA. CODE ANN., Section 84-932, N. MEX. STAT. ANN., Section 12-3-43; and VA. CODE, 32-423. See to the contrary, the recent rulings cited at notes 236 and 237, infra.

compromise of the marital parties' respective positions. The absence of such consent acts as an absolute bar on an abortion sought by a married woman, unless her *life* is at stake. This occurs regardless of whether such consent has been specifically denied or otherwise not forthcoming for any of a host of possible reasons. In either case, refusal or failure of a spouse to consent is legislatively permitted to override the joint abortion decision of the patient and her physician.

The subsequent result, mandated by this challenged Section, is the ultimate supremacy of the husband's desires over those of his wife, the pregnant patient, another Jane Doe or Mary Roe. The physically absent spouse's consent cannot, of course, be solicited much less obtained; a frequent situation and a circumstance for which this Section makes no mention nor provision.

On its face, this requirement interferes with the abortion decision and its effectuation without regard to the gestational period of pregnancy because by its terms it is applicable at every stage of pregnancy.[192] It is totally unrelated to the concern of maternal health. In addition, it is arguable that spousal consent under this Section would be required for the woman's use of an intra-uterine device (IUD) or any other form of contraception which operates to prevent the implantation in the uterine wall of a previously fertilized ovum.[193]

The magnitude of interference is illustrated in part by the trial testimony of Ms. Judith Widdicombe, Executive Director of Reproductive Health Services, the prime medical facility performing abortions in St. Louis, Missouri.

She testified that during the period from enactment of the challenged statute to date of trial (June 15, 1974 through July

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[192] See, IIB1a, supra at 37.

[193] Bengston, *et al.*, *The Effect of the Lippes Loop on Human Myometrial Activity*, 98 AMER.J.OBSTET. AND GYNECOL. 957, 964 (1967).

22, 1974), her institution, as a direct result of compliance with this Section, refused abortion services to 22 women for and by reason of the fact that they *would* not obtain spousal consent and, similarly, to 38 women who *could* not obtain spousal consent.[194] A total of 60 women were denied abortions during a five-week period at one facility, alone, by this challenged Section. Similar testimony was given by Dr. James C. Warren, Chairman of the Department of Obstetrics-Gynecology at Washington University Medical School and Barnes Hospital.[195] The magnitude of the crisis herein created is self-evident.

The only expert medical witness of defendants who performed abortions, Dr. Gerald G. Anderson, Chief of Obstetrics at Yale University,[196] and plaintiffs' witnesses, Judith A. Widdicombe[197] and Dr. James C. Warren,[198] all testified that normal medical practice is not to require spousal consent for an abortion.

Defendants utterly failed to meet the imposed standard of a compelling state interest for the requirement.[199] Defendants unwarrantedly argued that compelling childbirth upon a wife desiring an abortion will somehow preserve the institution of marriage, more so than allowing an abortion over the wishes of an objecting husband. The additional strains upon the marriage of another child hardly justified defendants' irrational conclusion and the irrebutable presumption[200] upon which the challenged Section is based—that marital harmony is better preserved by forcing motherhood on an undesiring wife than by

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[194] R. 149-150.

[195] *Id.* at 12, 22-24.

[196] *Id.* at 352.

[197] *Id.* at 165.

[198] *Id.* at 22.

[199] See, IIB2, supra at 40.

[200] See, IIB3ci, supra at 45.

denying to a husband the culmination of his wife's pregnancy through birth.

This Section suffers fatally from being unconstitutionally vague as to the meaning of its sole excepting clause, "to be necessary in order to preserve the life of the mother."[201] On its face, and even more seriously when taken in connection with the other terms, "preserve" can have many meanings. Does it mean to keep alive, and if so, for how long? Or, does it mean to keep free from harm or injury? Serious injury? How serious? Or, is "preserve" a much broader notion, meaning to maintain, to protect, to safeguard and/or to enrich? The statute and prior cases are silent.[202] Again, the question would go to the lay jury, without guidelines. Both *The People* v. *Belous*[203] and *Doe*, et al. v. *Scott*, etc., et al.,[204] specifically held the word "preserve" to be constitutionally defective for vagueness in a similar context.

Black's Law Dictionary,[205] used as reference by the Missouri Supreme Court in defining terms for constitutional tests of vagueness,[206] defines preservation as "Keeping safe from harm; avoiding injury, destruction, or decay." This term "presupposes a real or existing danger."[207]

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[201] See, IIB3b, supra at 41.

[202] The same excepting clause was contained in the now voided MO.REV.STAT. Section 559.100. See, *Roe* at 118, at note 2.

[203] 71 Cal. 2d 954, 960-961 (1969), 458 P.2d 194, 198-199, 80 Cal. Rptr. 354, 358-359, *cert. denied*, 397 U.S. 915 (1970).

[204] 321 F.Supp. 1385, 1389 (N.D. Ill. 1971), *vacated and remanded* sub nom. *Hanrahan*, etc. v. *Doe*, et al., 410 U.S. 950 (1973).

[205] BLACK'S LAW DICTIONARY, 1348 (4th Ed. 1951).

[206] *State of Missouri* v. *Katz Drug Company*, 352 S.W. 2d 678, 681 (Mo. 1961).

[207] *The State* ex rel. *Pollock* v. *Becker*, etc.. 289 Mo. 660, 705 (1921), 233 S.W. 641, 649.

The first difficult term is joined by a second, "necessary". How necessary? Why necessary? Necessary to what end? The lawyer's standard dictionary states that the word "necessary",

> "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought."[208]

As *Black's Law Dictionary* notes, the word "necessary" is intrinsically equivocal.

The word "necessity" is derived from the same root as and is synonymous with "necessary" and as such has been held by the Missouri Supreme Court to be vague and violative of constitutional standards. The Missouri Supreme Court in ruling on language in a law prohibiting Sunday Sales held,

> "In the light of the history and background of these sections, and taking judicial notice of the matters hereinabove mentioned, upon what we deem to be an objective reappraisal of our views as formerly expressed, we have concluded, and accordingly hold that the presence of the phrase 'or other articles of immediate necessity' renders the statutory scheme of Sunday closing (as embodied within the two sections here under scrutiny) so vague and indefinite that it cannot be ascertained with any reasonable degree of certainty what sales are permitted, and what sales are interdicted, thus making the statute incapable of rational enforcement, and hence void."[209]

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[208] BLACK'S LAW DICTIONARY, 1181 (4th Ed. 1951).

[209] *Fred Harvey* v. *Priest*, et al., etc., 366 S.W.2d 324, 328 (Mo. 1963).

Surely, the law[210] under consideration in *Harvey*, supra, the violation of which was a misdemeanor, punishable by fine not exceeding fifty dollars, must demand a standard of vagueness far less stringent than the statute herein challenged, the violation of which is punishable by fine and/or imprisonment and, if a physician, license revocation.[211] "Necessary" was similarly held vague in *The People* v. *Belous*, supra,[212] and *Doe*, et al. v. *Scott*, etc., et al., supra.[213]

A federal decision[214] has held the concept of "necessary" unconstitutionally vague, as has this Honorable Court.[215] A California Appellate Court has held the term "necessary" to grant absolute discretion in the one defining it[216] and an Ohio court defined "necessary" as ranging "from mere convenience to logical completeness."[217] Numerous cases have held the specific word "necessary" to be unconstitutionally vague in similar abortion statutes.[218]

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[210] MO.REV. STAT., Section 563.730 (repealed 1963).

[211] See Sections 12 and 14 of the challenged legislation.

[212] Supra at note 203.

[213] Supra at note 204.

[214] A statute which permitted only "necessary" noise was struck down for vagueness. *Phillips*, et al. v. *The Borough of Folcroft, Pennsylvania*, et al., 305 F.Supp. 766, 770-771 (E.D.Pa. 1969).

[215] *Yu Cong Eng*, et al. v. *Trinidad*, etc., et al., 271 U.S. 500 (1926) held a requirement that account books "necessary" for tax investigation purposes be kept in language other than Chinese void. "Necessary" described as a term with "great indefiniteness" (271 U.S. at 517), "a vague requirement, and one objectionable in a criminal statute." 271 U.S. at 518.

[216] *Westphal* v. *Westphal*, 122 Cal.App. 379, 382 (1932), 10 P.2d 119, 120.

[217] *City of Dayton* v. *Borchers*, 13 Ohio Misc. 273, 278 (1967), 232 N.E.2d 437, 441.

[218] See: *The People* v. *Belous*, 71 Cal.2d 954, 960-961 (1969), 458 P.2d 194, 198-199, 80 Cal.Rptr. 354, 358-359, *cert. denied*,

The challenged Section gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they select.

In medicine it is the patient's entire life-setting which is to be taken into account today, not simply whether a specific physiological condition will cause or contribute to death. Largely because of this civilized progress in medicine, the wording of this Section has become obsolete as a valid medical consideration. Medicine has progressed beyond the historical triad of heart, lungs and kidneys. Life has become more than survival. It has been seen to contain a spectrum of conditions, matters of degree which contribute to the quality of life, rather than the bare fact of survival.

One of many easily conceivable examples of lack of clarity inherent in the statute is that posed by Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al.

> "However, I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.
>
> A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the

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397 U.S. 915 (1970); *United States* v. *Vuitch*, 305 F.Supp. 1032 (D.D.C. 1969), *reversed on other grounds*, 402 U.S. 62 (1971); *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385 (N.D.Ill. 1971), *vacated and remanded* sub nom. *Hanrahan*, etc., v. *Doe*, et al., 410 U.S. 950 (1973); *State* v. *Munson* (S.D. Cir.Ct., Pennington Co., Apr. 6, 1970). See, also, the dissent of Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 750 (N.D.Ohio, 1970).

patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that this patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?"[219]

The psychiatric implications of unwanted pregnancies are enormous and prompted the American Psychiatric Association[220] to resolve through their Board of Trustees on December 12-13, 1969,

"A decision to perform an abortion should be regarded as strictly a medical decision and a medical responsibility. It should be removed entirely from the jurisdiction of criminal law."

Numerous federal decisions in abortion cases issued prior to 1973 held the excepted wording to be vague. As so aptly noted by the majority in *Doe*, et al. v. *Scott*, etc., et al., supra,

"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits."[221]

The Supreme Court of Florida clearly recognized the inherent danger of the phrase,

"The words 'necessary to preserve the life of such mother' become free-wheeling concepts, too easily taking on meaning from the jurors predilections or religious prejudices."[222]

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[219] *Id.* at 749.

[220] The A.P.A. is the second largest medical specialty organization in the United States, being composed of approximately 20,000 physicians who specialize as psychiatrists in the diagnosis, care and treatment of mental diseases and defects of the mind.

[221] 321 F.Supp. at 1388.

[222] *Walsingham*, et al. v. *State of Florida*, 250 So.2d 857, 862 (Fla. 1971).

It cannot be assumed that the absence of the excepting word "health" was a legislative oversight. The joint phrase "life and health" was expressly contained in Sections 5, 6(1), 6(3), 7, and A; but expressly excluded in this challenged Section and the following Section 3(4) requiring parental consent.

Neither can use of the word "life" in this context be reasonably construed to include the concept of "health"; and several courts have so held "health" not to be incorporated into the concept of "life".[223]

Lastly, in *Roe*, et al. v. *Wade*, etc., 314 F.Supp. 1217 (N.D. Tex. 1970), *affirmed*, 410 U.S. 113 (1973), a three-judge federal panel, without specifying particularly offensive words, held the entire phrase ("for the purpose of saving the life of the mother")[224] within the Texas statute to be vague and overbroad.

In affirming, this Honorable Court, while avoiding the problems of statutory vagueness,[225] clearly included the standard of "health" to be imposed upon the states as a shibboleth for permitted statutory restrictions.[226] Health in the abortion context includes the mental, psychological and emotional aspects, not merely the physiological components of health.[227] This challenged Section provides only for life saving exceptions.

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[223] *Doe*, et al. v. *Turner*, etc., et al., 361 F.Supp. 1288, 1291-1292 (S.D. Iowa 1973); *Montalvo*, et al. v. *Colon*, etc., et al., 377 F.Supp. 1332, 1344 (D.P.R. 1974); and *Rodos*, et al. v. *Michaelson*, etc., 396 F.Supp. 768, 775-776 (D.R.I. 1975).

[224] TEX. PENAL CODE, Art. 1196.

[225] *Roe* at 164.

[226] *Roe* at 164-165.

[227] *United States* v. *Vuitch*, 402 U.S. 62, 72 (1971).

This challenged Section also suffers from the defect of overbreadth.[228] The lack of spousal consent in the case of any specific pregnancy may, under the challenged Section's terms, not only be the result of a husband's refusal to accede to his wife's desire to abort. It may well include: A pregnant, married woman in the midst of dissolution of marriage proceedings; A pregnant, married woman who has been deserted by her husband shortly after conception and who has no idea as to his whereabouts; A married woman, pregnant by a man other than her husband, the latter having deserted her many years before and whose whereabouts are completely unknown to her; A married pregnant woman with severe medical contra-indications for child birth, whose husband has no concern for the risks to her health or life; And a married woman, impregnated as a result of criminal assault and rape[229] and whose husband either will not consent or for reasons of unavailability, unlocatability or otherwise cannot consent. None of these married, pregnant women could obtain an abortion without spousal consent under this challenged Section, unless the same was necessary to preserve her life; regardless of the myriad of other pressures or compelling justifications for choosing to terminate the pregnancy. In short, the wife can not obtain an abortion for any reason (unless life-saving) without her husband's consent, which can be withheld for any reason or for no reason.

In all of the above situations in which the spouse has not impregnated his wife, his lack of consent would serve to prevent an abortion from being obtained and yet he would have no legal obligations, duties or rights in regard to the resulting child following birth. He would be free to turn his back and to ignore the child's welfare. The mother, however, would continue to

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[228] There can be no serious question that plaintiffs may raise all aspects of overbreadth as to all the variegated applications of this and other challenged Sections. See *Bigelow* v. *Commonwealth of Virginia*, — U.S. — (1975).

[229] See note 234, infra.

have full legal obligations of support towards such child, including criminal sanctions[230] in case of her failure to support. Under Missouri law,[231] a marriage can be dissolved by reasons of pregnancy conceived with another prior to marriage[232] or refusal to engage in sexual intercourse.[233] Thus while extramarital pregnancy or refusal to participate in intercourse are grounds for dissolving a marriage; they are not reasons under this Section which would negate the necessity of spousal consent, contended by the State to be an aid towards marital harmony.

Pregnancy through rape is not beyond reasonable possibility, 1,342 forcible criminal rapes having occurred in Missouri during 1973.[234] A married woman impregnated as a result of rape faces the unacceptable and anomalous situation where she may be forcibly impregnated by one man and then be forced to continue such pregnancy through to childbirth by the wishes of her husband; finally bearing a child for which she will have continuing legal liability for its support while her husband has none.

The private right of reproductive and procreative activity has been held to be a right of the individual. It is not a right of the marriage relationship[235] nor is it a right of the spouse, legally

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[230] MO. REV. STAT., Section 559.353.

[231] Under the present "no-fault" dissolution law, MO. REV. STAT., Section 452.320 (1)(2)(b), acceptable grounds are that "respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." Specific grounds for divorce under the now repealed MO. REV. STAT., Section 452.010, can be presumed to meet the now general definition of grounds for dissolution.

[232] *Needham* v. *Needham*, 299 S.W. 832, 835 (1927).

[233] *Cox* v. *Cox*, 493 S.W.2d 371, 373-374 (Mo.Ct.App. 1973).

[234] *Uniform Crime Reports for the United States, 1973*, U.S. DEPT. OF JUSTICE, at 70, at Table 4.

[235] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 453 (1972).

compensable if lost through the fault of another.[236] Two recent cases have recognized the right of a woman without her husband's approval to submit to surgical sterilization.[237]

Two early reported cases, an Iowa case in 1879[238] and a New York case in 1952[239] denied recovery to husbands whose wives underwent abortions without their consent.

This Section attempts to grant greater rights to spouses by reason of their marriage than granted to unmarried fathers; and yet this Honorable Court has recognized this to be an invalid distinction in the area of reproduction and procreation.[240] While this Honorable Court has held that the rights of putative fathers regarding their illegitimate children are constitutionally protected,[241] this Section discriminates on its face against such fathers in favor of spouses, who are granted a right to deny their wives an abortion, even in cases where they themselves may not have impregnated their wives; truly an anomalous situation at odds with constitutional guarantees.

When read in conjunction with challenged Section 7, the situation reverses and putative fathers receive favored treatment. Following live birth, the non-spousal or putative father, not having been forced to approve or disapprove the abortion under

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[236] *Murray* v. *Vandevander*, et al., 522 P.2d 302 (1974), in which a husband's consent for the sterilization of his wife was held not legally required nor the lack of the same compensable.

[237] *Murray, id.*, and *Ponter*, et al. v. *Ponter*, et al. (Superior Court of New Jersey, Docket No. C-3599-74, June 9, 1975).

[238] *Kansz* v. *Ryan*, et al., 51 Iowa 232 (1879), 1 N.W. 485.

[239] *Herko* v. *Uviller*, 203 Misc. 108 (1952), 114 N.Y.S. 2d 618.

[240] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972).

[241] *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

this Section 3(3), retains all rights[242] and obligations[243] in regard to the child, while the consenting spouse has relinquished all such rights and obligations. It is widely recognized that the legitimacy of the parent-child relationship is not a valid criterion in determining legal rights between them.[244]

With the exception of the District Court below, the courts have unanimously ruled that putative fathers and spouses have no common law nor constitutionally valid statutory right to consent or to withhold consent to a woman's abortion.

A common law right asserted by a putative father to enjoin an abortion was denied by the Florida courts.[245] The Court held the decision to abort is a right *"purely personal to the mother"*[246] and that the option to abort was not foreclosed by the prior willful act of intercourse, knowingly without the use of contraception. Putative fathers have similarly been held not to be indispensable parties in a suit against a hospital seeking to compel the performance of abortion.[247]

In *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D. Utah 1973) a spousal consent clause was voided,

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[242] *W.* v. *M.*, et al., 490 S.W.2d 64 (Mo. 1973). The consent of the father to the adoption of a child born out of wedlock is required, unless he has willfully abandoned or neglected such child. (MO. REV. STAT., Section 453.040).

[243] *State of Missouri* v. *Tschirner*, 504 S.W. 2d 302, 305 (Mo.Ct. App. 1973); and *Gomez* v. *Perez*, 409 U.S. 535 (1973).

[244] *Stanley*, supra at note 241; *Gomez, id.; Levy*, etc. v. *Louisiana*, etc., et al., 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Company*, et al., 391 U.S. 73 (1968); and *Weber* v. *Aetna Casualty & Surety Co.*, et al., 406 U.S. 164 (1972).

[245] *Jones* v. *Smith*, et al., 278 So.2d 339 (Fla. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974).

[246] *Id.* at 341.

[247] *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F.2d 756, 759 (7th Cir. 1973).

"(B)ecause it subjects exercise of the individual right of privacy of the mother, in all abortions at all stages of pregnancy, to the consent of others."[248]

In *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 (S.D. Fla. 1973), the federal panel stated,

"The failure of the Florida 'spousal . . . consent' requirement is that it gives to husbands . . . the authority to withhold consent for abortions for any reason or no reason at all. . . . It follows inescapably that the State may not statutorily delegate to husbands . . . an authority the States does not possess."[249]

In *Coe*, supra, consent was not required if the husband was "voluntarily living apart from the wife"[250], contrary to the herein challenged Section which permits situations beyond the realm of any rational State objective. Spousal consent in Missouri for women between the ages of 18 and 21 years of age was previously voided by the Eighth Circuit Court of Appeals.[251]

In those situations where the wife's life may be endangered by the pregnancy, at a point short of an abortion being necessary to preserve her life, this Section would grant to the husband-spouse the arbitrary life-controlling choice of risking his wife's death through his refusal to consent to the abortion. He would be free to make this choice even though the statistical chances of the fetus surviving the pregnancy might be far less than the odds of his wife surviving the pregnancy.[252]

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[248] 366 F.Supp. at 193.

[249] 376 F.Supp. at 698.

[250] FLA. STAT. ANN., Section 458.22(3) (1972).

[251] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1354 (8th Cir. 1974).

[252] For disapproval of arbitrary life or death decision making power without reasonable standards, see *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Any weighing of interests between those of pregnant women and those of a spouse (even in those instances in which he has impregnated his wife) finds the balance heavily favoring the interests of the woman.

"His interests are principally economic, prospective, and contingent, and their realization is largely dependent upon the live birth of the child.

The wife's claim for protection equal to that extended to all other unwillingly pregnant women is based on her personal right to privacy in matters relating to the protection of her physical and mental health. A personal and not a property right, it is far more precious than mere property rights, and escapes meaningful economic measure."[253]

In affirming *Coe*, supra, sub nom., *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975), the Fifth Circuit Court of Appeals added,

"There is no requirement that the husband sire the fetus nor even that the woman be married, at the time of conception, to the same man whose consent is later required for the abortion. The statute therefore seems to base the husband's interests upon his marriage to the woman rather than his paternity of the fetus. As a consequence, the rights of the husband which arguably spring from his interest in the fetus are of doubtful applicability in this case."

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[253] Georgius, *Roe* v. *Wade. What Rights the Biological Father?*, 1 HASTINGS CONST. L.Q. 251, 271 (1974). For another discussion as to the various interests to be considered, concluding that the woman's right to an abortion must be supreme, see Robertson, *Paternal Rights in the Decision to Terminate a Pregnancy*, 2 THE WOMEN'S RIGHTS L. REP. 3 (1975), pp. 13-19. See, also, *Woman's Right to Have Abortion Without Consent of, or Against Objections of, Child's Father*, 62 A.L.R. 3d 1097.

"Moreover, we believe that the state interest in the husband's interest in the fetus is simply too attenuated to strip the woman of her fundamental right to privacy."

. . .

"In any case, the state may secure the man's procreative rights by merely making unconsented abortion a ground for divorce. The man may then enter into a new marriage relationship and the state may thereby protect his procreative interests without infringing upon the former wife's right to abortion."[254]

While a man may well have a fundamental right to procreate, that right can not be said to exist within any particular marriage nor with any particular woman.

Missouri has not seen fit to value the existence of previable fetuses in the field of torts and case law provides that only "a viable child, injured while en ventre sa mere, born alive, may after its birth, maintain a tort action."[255]

In the context of denying to a husband the right to control his wife's access to an abortion, the courts have distinguished cases such as *Meyer* v. *State of Nebraska*, 262 U.S. 390 (1923), *Skinner* v. *Oklahoma* ex rel. *Williamson*, etc., 316 U.S. 535 (1942), *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965) and *Loving*, et ux. v. *Virginia*, 388 U.S. 1 (1967), by noting that,

"These and other cases formed the basis for the court's recognition of a right of privacy in Roe v. Wade . . . But all those cases involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens. . . . We find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife."[256]

A federal three-judge panel voided a Kentucky statute requiring husband's consent by noting that it gave,

"(P)ower to the husband . . . to withhold consent without any reason, or without good reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health."[257]

A federal panel in Pennsylvania reached the same conclusion.

"The challenged spousal consent provision of the Abortion Control Act is invalid because it does not balance the interest of the pregnant woman with the purported interest, if there is a constitutional one, of the husband; but rather the provision gives the spouse an unqualified and unconditional veto over the wife's decision to have an abortion, thus completely ignoring the fundamental right of the pregnant woman to make the abortion decision."[258]

The majority opinion of the District Court below attempted to justify upholding this challenged Section by exalting the marital relationship and the state's interest in it.[259] As to any such interest the state may have in this area, the state sees fit to give either party the freedom to dissolve the same with relative

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[254] 517 F.2d at 796-797.

[255] *Steggall*, etc., et al. v. *Morris*, 363 Mo. 1224, 1233 (1953), 258 S.W.2d 577, 581.

[256] *Doe* v. *Doe*, et al., — Mass. — (1974), 314 N.E. 2d 128, 130. See, *Pound* v. *Pound*, 42 L.W. 2456 (Ill. Cir.Ct., Jan. 31, 1974).

[257] *Wolfe*, supra at note 69, at 637.

[258] *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D.Pa. 1975), slip opinion at 15-16.

[259] Jur. St. A-11 through A-13; 392 F.Supp. at 1369-1371.

ease.[260] The interest in the preservation of the relationship does not surpass the desire of the parties. Persons may marry, live their respective lives totally separate and apart, and still benefit from the tax or other legal advantages afforded to the legal concept of the relationship.

Stated simply,

> "(T)he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[261]

The separateness logically implies differences and occasional stalemate. It is interesting to observe that in regard to consent for minors,[262] only one parent need consent, thereby engendering disagreement between the minor's parents as to whether an abortion should be permitted. This, of course, is the very type of marital discord which the defendants have attempted to rely upon in justifying this challenged Section. The prevalence of the demand for abortion among married women is significant, approximating 25% of the total demand for abortions; and the impact of this Section upon such population in Missouri is manifest.[263]

VI. Section 3(4)—The Requirement of Parental Consent for Unmarried Minors Under the Age of 18 Years.

This Honorable Court in *Roe* did not decide the constitutionality of statutes providing that "if the woman is an unmarried

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[260] MO. REV. STAT., Chapter 452.

[261] *Eisenstadt*, supra at note 240, at 453.

[262] Challenged Section 3(4).

[263] See, note 21 supra.

minor, written permission from the parents is required"; because, the issue not being then directly presented, there was no need to "decide whether provisions of this kind are constitutional."[264]

Nevertheless, plaintiffs contend here that the meaning and intent of this Honorable Court's decisions in *Roe* and *Doe* unquestionably prohibit a statutory requirement of written, parental consent.

This challenged Section blatantly affronts the holding of *Roe* that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[265] It is not merely the concept of parental consent which is void, but the state's requirement of the same, *per se*, and its cumuative effect and enforcement in application. *Shelley*, et ux. v. *Kraemer*, et ux., 334 U.S. 1 (1948), *et seq.*

Subjecting the medical decision of abortion to the prior approval of a minor woman's parent impermissibly intrudes into the First Amendment rights of medical advice and treatment between a physician and patient.[266] No other state statutes, criminal or otherwise, requires the additional consent of a minor's parent for medical or surgical treatment.[267]

Although the age of majority remains 21 years in Missouri,[268] by statute minors at 18 years in Missouri can independently con-

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[264] *Roe* at 165, at note 67.

[265] *Id.* at 163.

[266] See, IIA1, supra at 28.

[267] See IIB1b, supra at 37.

[268] *State of Missouri* ex rel. *McNary*, etc. v. *Stussie*, etc., et al., 518 S.W. 2d 630 (Mo. 1974).

sent to donate blood.[269] Minors in Missouri of any age can legally consent to medical services for pregnancy (excluding abortion), venereal disease and drug abuse.[270] Minors who are parents, whether married or unmarried, may statutorily consent to any type of medical service for themselves or for their child.[271] On its face, the general terms of the latter statute are inconsistent with the specific prohibition of the challenged Section in regard to unmarried minor parents. In summation, Missouri statutes expressly permit childless minors to consent to all medical services related to maternity or pregnancy (excluding abortions). Minors who are parents can also consent to maternity or pregnancy related medical services (excluding abortion) and seemingly authorize themselves to be sterilized.

It is only abortion which the State of Missouri has invalidly singled out for exclusion from the general treatment of pregnancy for minors[272] and for which the State of Missouri attempts to mandate parental consent out of the class of all other medical and surgical procedures.[273]

The requirement of parental consent, by the terms of this challenged Section, leaves no room for any exception or compromise among disagreeing family members. The absence of the required consent acts as an absolute bar on an abortion sought by a minor woman, unless her *life* is at stake. This occurs regardless of whether such consent has been specifically denied or otherwise not forthcoming for any of a host of possible reasons. In either case, refusal or failure of either parent to consent is legislatively allowed to override the joint decision of the patient and her physician.

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[269] MO REV. STAT., Section 431.064.

[270] MO. REV. STAT., Section 431.061.

[271] MO. REV. STAT., Section 431.065.

[272] See, IIB4a, supra at 50.

[273] See, IIB1b, supra at 37.

The subsequent result, mandated by this challenged Section, is the ultimate supremacy of the parents' desires over those of the minor child, the pregnant patient. The parents are given a right of veto.

On its face, this requirement interferes with the abortion decision and its effectuation with total disregard to the gestational period of pregnancy, because by its terms it is applicable at every stage of pregnancy.[274] It is totally unrelated to the concern of maternal health. In addition, it is arguable that parental consent under this Section would be required for the woman's use of an intra-uterine device (IUD) or any form of contraception which operates to prevent the implantation in the uterine wall[275] of a previously fertilized ovum.

The decree of the challenged Section's interference is illustrated in part by the trial testimony of Ms. Judith Widdicombe, Executive Director of Reproductive Health Services, the prime medical facility performing abortions in St. Louis, Missouri.

She testified that during the period from enactment of the challenged statute to date of trial (June 15, 1974 through July 22, 1974), her institution, as a direct result of compliance with this challenged Section, refused abortion services to 26 unmarried minor women for and by reason of the fact that they *would* not seek parental consent and, similarly, to 12 unmarried minor women who *could* not obtain parental consent.[276] A total of 38 unmarried minor women were denied abortions during a five-week period at one facility, alone, by operation of this challenged Section. Similar testimony was given by Dr. James C. Warren, Chairman of the Department of Obstetrics-Gynecology at Washington University Medical School and

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[274] See IIB1a, supra at 37.

[275] Bengston, *et al.*, supra at note 193.

[276] R. 151-152.

Barnes Hospital.[277] The magnitude of the crisis herein created is self-evident.

The only expert medical witness of defendants who performed abortions, Dr. Gerald G. Anderson, Chief of Obstetrics at Yale University[278] and plaintiffs' witnesses, Dr. Warren[279] and Judith A. Widdicombe,[280] all indicated that parental consent is only required of minors for an abortion because of the potential risk of civil liability, a risk which would be obviated by the voiding of this challenged Section and the recognition of a minor's constitutional right to abortion. The concept of informed medical consent involves more than the mere age of the consenting party; and the factors comprising informed medical consent are equally applicable to minors as they are to adults.

Defendants utterly failed to meet the imposed standard of a compelling state interest for this requirement.[281] Defendants unwarrantedly argued to the District Court that compelling childbirth upon a minor desiring an abortion, contrary to her parents' wishes, would somehow preserve the institution of the family more so than allowing an abortion over the wishes of objecting parents. The additional strains upon the family unit of another child hardly justify defendants' irrational conclusion and the irrebutable presumption[282] upon which the challenged Section is based—that marital harmony is better preserved by forcing motherhood upon an undesiring minor child than by denying to the minor child's parents the culmination of their child's pregnancy through birth.

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[277] *Id.* at 25-26.

[278] *Id.* at 302-303, 352-353.

[279] *Id.* at 25.

[280] *Id.* at 152.

[281] See, IIB2, supra at 40.

[282] See, IIB3ci, supra at 45.

This challenged Section suffers from being unconstitutionally vague and violative of *Roe* and *Doe*, as to the meaning and force of its sole exception clause, "as necessary in order to preserve the life of the mother."[283]

This challenged Section also suffers from the fatal defect of overbreadth.[284] The lack of parental consent in the case of any specific pregnancy may, under the challenged Section's terms, include the following circumstances: A minor impregnated through rape or incest; A minor emancipated, living apart from her parents and fully independent of them for any support, financial, emotional or otherwise; A non-virgin 16-year old minor statutorily of age to independently consent to sexual intercourse;[285] A minor whose religious views sharply differ from those of her parents as to the ethics of abortion; And a minor who previously had been married but now widowed or divorced, with or without other children of her own. None of these unmarried pregnant minors could obtain an abortion without parental consent under this challenged Section, unless the same was necessary to preserve her life; regardless of the myriad of other pressures or compelling justifications for choosing to terminate the pregnancy.

This challenged Section also violates the constitutional standard of privacy enunciated in *Eisenstadt*, supra,[286] that,

> "(I)t is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into mat-

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[283] See IIB3b, supra at 41; and the extended discussion specifically on this objectional wording under Point V (challenged Section 3(3)—Spousal Consent), supra at 76-81.

[284] See note 228, supra.

[285] MO. REV. STAT., Sections 559.260 and 559.300. A sexually experienced 16-year old female is therefore capable of consenting to intercourse two years earlier than she can consent to aborting the products of conception under the challenged Section.

[286] *Eisenstadt*, etc., supra at note 240, at 453.

ters so fundamentally affecting a person as the decision whether to bear or beget a child."

Missouri women who marry with parental consent under the age of 18 years[287] do not require parental consent to abort; yet their contemporaries who have chosen not to marry must seek such parental approval. Is it to be assumed that parental consent to marry is synonymous with parental consent to abort; and if that premise be true, why is such consent then withdrawn for a widowed or divorced minor under the age of 18 years, who still requires parental consent to abort under the challenged Section?

The need of minors for ready and available access to abortion services and the effects of such services upon them is well documented in the literature. Being unmarried and being young appear to be two independent factors which correspond directly with patient delay in seeking early abortions.[288] The dangers of such delay have been recognized.[289] The relationship between pregnancy, marriage and youth is also significant. One study in 1972 concluded that in Whatcom County, Washington, 73.3% of all 16-year old women being married were pregnant and 55.3% of all 17-year old women being married were pregnant.[290] Unmarried minors between the ages of 15 and 19 years constituted 16.2% of all abortions performed in New York City during 1971, 32.3% of all abortions performed in the State of California during 1973[291] and approximately

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[287] MO. REV. STAT., Section 451.090.

[288] Bracken, *et al., Delay in Seeking Induced Abortion: A Review and Theoretical Analysis,* 121 AMER. J. OBSTET. AND GYNECOL. 1008, 1010 (1975).

[289] *Roe* at 150.

[290] Tillack, *et al., A Study of Premarital Pregnancy,* 62 AM. J. PUB. HEALTH 676 (1972).

[291] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area,* THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 73.

29% of all abortions performed in the combined states of Alaska, Colorado, Delaware, Georgia, Hawaii, New York, Oregon and South Carolina during 1972.[292]

A national study of the sexual experiences of adolescents (ages 12-19 years) reveals that 45% of the females have engaged in sexual intercourse and only 32% of said adolescents were certain that some form of birth control had been practiced during the initial act of intercourse.[293] Generally, it has been recognized that "the decision to have intercourse was unrelated to contraceptive use."[294]

> "(T)he fact that teenage pregnancies have a greater risk of death and medical complications than pregnancies of older women has been documented extensively in the literature . . ."[295]

Not only do minors tend to seek abortions later in their pregnancies, but the medical risk to minors is greater than it is for older women for abortions sought at any stage of pregnancy. These statistical realities are compounded by this challenged Section which deters and encumbers the early abortion of minors by requiring their seeking and securing parental consent.

A pregnant minor, who has passed her seventeenth birthday and unable to obtain parental consent to abort, may well be forced to wait until her next birthday late into her pregnancy to terminate, greatly increasing the risk to her life. Or, she may

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[292] *Center for Disease Control: Abortion Surveillance: 1972,* U.S. DEPT. H.E.W., Atlanta: 1974, at figure 2.

[293] Sorensen, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA, New York: 1973, at 213-214.

[294] Settlage, *et al., Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time,* 5 FAM. PLAN. PERSP. 223, 225 (1973).

[295] *Legalized Abortion and the Public Health,* supra at note 19, at 62.

instead choose to seek marriage with a sympathetic male, who will consent to the procedure, and agree to dissolve the marriage within a matter of days.

If challenged Section 3(3) falls, then this Section must similarly fail, for no rational distinction can be drawn between not requiring parental consent for a married minor but requiring parental consent for a minor previously widowed or divorced.

In all of the above situations in which the parents have played no part in the pregnancy, their lack of consent would serve to prevent an abortion from being obtained. Yet they would have no ongoing legal obligations, duties or rights in regard to the resulting child following its birth. They would be free to turn their backs and to ignore the child's welfare. The minor mother, however, would continue to have full legal obligations of support towards said child, including criminal sanctions in case of her failure to support.[296]

Missouri statutes require compulsory education only until 16 years of age and under certain circumstances only until 14 years of age,[297] allow minors of age 16 years to consent to an autopsy of a parent[298] and require the consent of any minor 14 years or older for their own adoption;[299] and yet this challenged Section precludes an unmarried minor under the age of 18 years the right to terminate a pregnancy for any reason (other than to save her life) without parental consent, which can be withheld for any reason or for no reason.

Generally, the courts have permitted minors of sufficient intelligence, education, maturity and experience to consent to

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[296] MO. REV. STAT., Section 559.353.

[297] *Id.*, Section 167.031.

[298] *Id.*, Section 194.115.

[299] *Id.*, Section 453.030.

medical procedures, absent specific statutory authorization. Judicial consent has been granted to mature minors for sterilization,[300] rhinoplasty,[301] skin graft[302] and tonsilectomy.[303] The factors employed to evaluate each minor, as to ability to give an informed consent, include the degree of education, intelligence, maturity, age, experience and judgment. The medical evaluation by the physician of these areas adequately safeguards whatever interest the state may have in protecting the minor from his or her own immaturity.

Analogously, the courts have also recognized the rights of minors for medical access to contraception.

> "The interest of minors in access to contraceptives is one of fundamental importance. The financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults."
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> . . .
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> "(P)laintiff and her class must consult with a physician . . . and . . . will be aided by the mature judgment of trained adults before making important decisions regarding sexual conduct."
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> . . .
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> "(W)e hold that the state may not enforce the choice of parents in conflict with a minor's constitutional right of free access to birth control information and services."[304]

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[300] *Smith* v. *Seibly*, et al., 72 Wash.2d 16 (1967), 431 P.2d. 719.

[301] *Lacey* v. *Laird*, et al., 166 Ohio St. 12 (1956), 139 N.E.2d 25.

[302] *Younts*, etc. v. *St. Francis Hospital and School of Nursing, Inc.*, 205 Kan. 292 (1970), 469 P.2d 330.

[303] *Bishop* v. *Shurly*, 237 Mich. 76 (1926), 211 N.W. 75.

[304] *T—H—*, et al. v. *Jones*, et al., — F.Supp. — (D.Utah 1975), slip opinion at 12, 14 and 15.

Similarly is an unanimous three-judge panel decision in *Population Services International*, et al. v. *Wilson*, et al., 398 F.Supp. 321 (S.D.N.Y. 1975).[305]

Missouri today remains the only state not having established the right of women under the age of 21 years to obtain contraception solely on her own consent.

This Honorable Court has held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967).[306] Accordingly, this Honorable Court has found constitutionally guaranteed procedural safeguards and substantive rights applicable to minors as well as adults. It is reasonable to conclude from this line of cases that minor as well as adult women have a right to privacy, that this right is broad enough to include the decision to have an abortion and that this fundamental right can be limited only by compelling state interests.

Generally, no abortion may be performed if the woman, irrespective of age or competence, refuses to consent. It is illogical to argue that, although a minor may carry her child to term against her parents' will,[307] she should not be able to terminate her pregnancy against their will. In *Eisenstadt*, supra, this Honorable Court rejected the theory that states could distinguish between married and unmarried couples by limiting the distribution of contraceptives to the former. If *Eisenstadt*, supra, is to be

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[305] The right of minors' access to medical contraception assistance without parental consent or knowledge has been endorsed, among others, by the American Medical Association, The American College of Obstetricians and Gynecologists, The American Academy of Pediatricians. The American Academy of Family Physicians, The American College Health Association and the American Public Health Association.

[306] See, also: *Breed*, etc. v. *Jones*, 421 U.S. 519 (1975); and *Wood*, et al. v. *Strickland*, et al., 420 U.S. 308 (1975).

[307] *Matter of Smith*, 16 Md.App. 209 (1972), 295 A.2d 238.

followed, a distinction between married and unmarried minors with respect to the availability of abortions is also improper.[308]

The courts have unanimously held that parental consent may not constitutionally be required by the state as a prerequisite to a minor's access to abortion.

A District of Columbia Court first held parental consent for abortion was not required, stating,

> "Therefore the Court has found that although a juvenile, and despite her age, Respondent's status was one of quasi-emancipation; her degree of maturity and knowledge was such that she fully understood the nature of the proceedings; the nature of the operation, how the operation is performed, and effects of such an operation; and that having an abortion does not violate any of her religious beliefs, which are distinguished from those of her parents." *In re P.J.* (D.C.Super.Ct., Feb. 6, 1973), *reported in* 12 Crim. L.Rep. 2549 (Mar. 28, 1973).

The state Supreme Court of Washington has also struck down the statutory requirements of parental consent.[309]

> "In the circumstances envisioned by this statute, there seems to be little parental control left for the State to help salvage: . . . Reestablishment of parental control by resort to the pure force of the criminal law seems both futile

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[308] *Eisenstadt*, supra at note 240, at 453, may reasonably be read as foreshadowing the *Roe* and *Doe* decisions one year later, by its language made applicable to women who both choose "to bear or beget a child."

[309] *The State of Washington* v. *Koome*, 84 Wash.2d 901 (1975), 530 P.2d 260. See, also: *Ballard*, et al. v. *Anderson*, etc., 4 C.3d 873 (1971), 484 P.2d 1345, 95 Cal.Rptr. 1; *Matter of Smith*, 16 Md.App. 209 (1972), 295 A.2d 238; and "Opinion" of the Honorable Evelle J. Younger, Attorney General of the State of California dated January 18, 1974, holding that parental consent is not required if "minor has sufficient maturity to give an informed consent."

and manifestly unwise in such a situation. . . . The decision to continue or terminate her pregnancy is, in effect, her first 'parental' decision. It should not arbitrarily be subordinated to her parents' last."[310]

The first federal court to rule on this issue was an unanimous three-judge panel in Utah..[311] There the Court made short-shrift of the parental clause by stating,

> "Section 76-7-304 is invalid because it subjects exercise of the individual right of privacy of the mother, in all abortions at all stages of pregnancy, to the consent of others."[312]

Other federal district court panels have similarly held in Florida,[313] Kentucky,[314] Colorado,[315] Massachusetts,[316] and Pennsylvania.[317] An Indiana and a Nebraska provision have been preliminarily enjoined.[318]

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[310] *Id.*, 84 Wash. 2d at 907, 530 P.2d at 265.

[311] *Doe* v. *Rampton*, etc., et al., 366 F.Supp. 189 (D.Utah 1973).

[312] *Id.* at 193.

[313] *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 (S.D. Fla. 1973); *affirmed* sub nom. *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[314] *Wolfe*, et al. v. *Schroering*, etc., et al., 388 F.Supp. 631 (W.D. Ky. 1974).

[315] *Foe* v. *Vanderhoof*, etc., et al., 389 F.Supp. 947 (D.Colo. 1975).

[316] *Baird*, et al. v. *Bellotti*, etc., et al., 393 F.Supp. 847 (D. Mass. 1975), cert. granted, — U.S. — (1975).

[317] *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D.Pa. 1975).

[318] *The Gary-Northwest Indiana Women's Services, Inc.*, et al. v. *Bowen*, etc., et al. (N.D.Ind., No. H-74-289, Jan. 31, 1975); and *Doe*, etc. v. *Exon*, etc., et al., (D.Neb., No. CV75-L-146, Nov. 3, 1975). A single Federal judge has similarly held in an unreported opinion in New York. *Modugno* v. *Monsey Medical Center* (S.D. N.Y. No. 73C230).

"As we learn from Roe v. Wade, supra, the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to . . . parents an authority the State does not possess."[319]

"(T)he broad provision as written gives power to the . . . parent to withhold consent without any reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health."[320]

"The interest of the state in fostering parental control or parental interests and responsibility in raising their children is perhaps the strongest interest asserted by the state in regard to the statute. . . ."

. . .

"However, those cases which have considered parental control of children have involved conflicts between parents and the state wherein the courts have considered intrusions by the state into the area of parental values—particularly religious values. Cases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor."[321]

"(P)arents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also,

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[319] *Coe*, supra at note 313, at 698.

[320] *Wolfe*, supra at note 314, at 636-637.

[321] *Foe*, supra at note 315, at 956.

whether imposing such burden on the minor would necessily (*sic*) improve the family relationship."[322]

"However desirable it may be to have parents involved in the abortion decision, it is clear that the state may not destroy the fundamental right of the pregnant minor to make the final decision concerning abortion, provided that she is capable of making an intelligent, informed decision."[323]

Two circuit courts of appeal have also held parental consent clauses to be constitutionally void.[324]

"Indeed, it would appear that all of the criteria of *Roe* apply with even greater force to an unwed pregnant minor: teenage motherhood involves serious consequences including adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school, and numerous other social dislocations. The magnitude of the minor's interest in avoiding these consequences suggests that the developmental differences between adults and minors do not warrant denying constitutional protection to the minor's abortion."[325]

Religiously motivated parents have previously been judicially estopped from threatening the medical well-being of minors in attempts to impose abortion[326] and to prevent blood transfusions.[327] Commentators have generally recognized the legal rights of minors to abortion services, free of parental knowledge and approval, and have recognized the dangers of denying the same.[328]

[322] *Baird*, supra at note 316, at 856.

[323] *Planned Parenthood Association*, supra at note 317, slip opinion at 19.

[324] *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974); and *Poe*, et al. v. *Gerstein*, etc., et al., 517 F.2d 787 (5th Cir. 1975).

[325] *Id.*, *Poe* at 791.

[326] *Matter of Smith*, supra at note 309. If parents cannot impose their desire for an abortion upon a minor child, by what logic can they prevent such an abortion?

[327] *Jehovah's Witnesses in the State of Washington*, et al. v. *King County Hospital Unit No. 1 (Harborview)*, et al., 390 U.S. 598 (1968), *affirming* per curiam 278 F.Supp. 488 (W.D.Wash. 1967).

[328] See: NOTE, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VIRG.L.REV. 305 (1974); Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973); Skegg, *Consent to Medical Procedures on Minors*, 36 MODERN L.REV. 370 (1973); and Pilpel, *et al., Abortion and the Rights of Minors*, 23 CASE W.RES. L.REV. 779 (1972).

VII. **Section 6(1)—The Physician's Standard of Care.**

This challenged Section, requiring physicians performing abortions to preserve the life and health of the fetus as though it were intended to be born, is the only Section of the statute held to be unconstitutional by the District Court.[329]

The language of this challenged Section provides, in part,

"No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

This language literally runs counter to the remainder of the challenged statute, which permits abortions under given circumstances, and counter to the explicit directives of *Roe* and *Doe*. It is by definition impossible to abort a fetus while exercising

[329] Jur. St. A-20; 392 F.Supp. at 1371.

the same "skill, care and diligence" used "to preserve the life and health of any fetus intended to be born." This vague, ill-defined and self-contradictory clause had a "chilling effect" upon plaintiffs and others similarly situated. Its meaning applied across the board to all stages of pregnancy and for this reason alone, among others, was constitutionally defective.[330] It is totally unrelated to the concern of maternal health.

An unanimous court in *Doe* v. *Rampton*, etc., et al., supra, voided similar sections of the Utah law providing,

> "Medical procedure where fetus sufficiently developed. —If an abortion is performed when the fetus is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that procedure which in the medical judgment of of the physician will give such fetus the best chance of survival, and no medical procedure designed to kill or injure such fetus may be used."
>
> "Medical skills to preserve life of fetus.—The physician performing any abortion must use all of his medical skills to promote, preserve and maintain the life of any fetus sufficiently developed to have any reasonable possibility of survival outside its mother's womb."[331]

The District Court stated,

> "Sections 76-7-309 and 76-7-310 are invalid because they might apply in any trimester, and because, regardless of the trimester in which they are applied, they unduly interfere with the professional judgment of the doctor involved."[332]

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[330] See, IIB1a, supra at 37.

[331] UTAH CODE ANN., Sections 76-7-309 and 76-7-310.

[332] 366 F.Supp. at 193.

In *Hodgson*, et al. v. *Anderson*, etc. et al., the unanimous court held invalid a like clause requiring abortions to be performed when the fetus is "*potentially* viable", "under circumstances which will reasonably assure the live birth and survival of the fetus."[333] An unanimous three-judge panel found that,

> "(T)hese subdivisions place restrictions upon the attending physicians during the *Roe* second stage which are not reasonably necessary for maternal health. In addition, these subdivisions prescribe procedures which are unnecessary in view of the existing professional standards and state health regulations attendant to any medical practice."[334]

An identical Pennsylvania statute required physicians during abortions,

> "to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted . . ."[335]

Noting that the Pennsylvania statute as to the physician's standard of care was unrelated to maternal health, the Court declared the same to be constitutionally void.[336]

Dr. Warren (R. 29), Dr. Thomas Kerenyi (R. 91) and defendants' witness, Dr. Anderson (R. 345) all testified that it is medically impossible to perform an abortion while simultaneously complying with the requirements of this challenged Section. There was no medical testimony to the contrary.

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[333] MINN. STAT., Section 145.412, subdivision 3(3).

[334] 378 F.Supp. at 1016-1017.

[335] PENN. ACT NO. 209, Section 5(a).

[336] *Planned Parenthood Association*, et al., supra at note 258, slip opinion at 29-30.

A fair and literal reading of this challenged Section reveals the intent that the first sentence, which utilizes the word "fetus," repeatedly and exclusively, and which contains no reference to a specific punishment, applies only to the intra-utero period. Similarly, the second sentence, which utilizes the word "child," repeatedly and exclusively, and which contains a reference to the specific punishment of manslaughter, applies only to the extra-utero period. Violation by a physician of the first sentence of this Section did remain punishable by Sections 12 and 14 of the challenged legislation.

The testimony of all witnesses further indicated that all methods of abortion, by definition and by design, are intended to produce the death of the fetus. Accordingly, the direct conflict between the first sentence of this Section and a woman's right to terminate a pregnancy is patent.

This Honorable Court wisely chose to leave the standards and duties of medical treatment by physicians where they rightfully belong, within "the usual remedies, judicial and intra-professional",[337] "professional censure and deprivation of his license."[338]

Lastly, to assume as defendants argued below, that Section 6(1), *in toto*, applies only post-natally, would create conflict and inconsistency as to the definition of the crime and its punishment with the pre-existing Missouri criminal, statutory scheme dealing with murder in the first degree,[339] murder in the second degree,[340] manslaughter[341] and killing of an unborn quick child.[342]

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[337] *Roe* at 166.

[338] *Doe* at 199.

[339] MO. REV. STAT., Sections 559.010 and 559.030.

[340] *Id.*, Sections 559.020 and 559.030.

[341] *Id.*, Sections 559.070 and 559.140.

[342] *Id.*, Section 559.090.

The District Court correctly held both in its "Order, Judgment and Decree" of January 31, 1975, and its "Order" of February 12, 1975, that the three sentences comprising the challenged Section 6(1) were not severable one from the other. (Jur. St. A-20 and A-35). 392 F.2d at 1374.

The second sentence of Section 6(1) is inextricably tied in with the first sentence, inasmuch as it refers to "*the* abortion" and "*the* child", an obvious reference to the preceding sentence. If this were not the case, the language utilized would undoubtedly be framed as "*an* abortion" and "*a* child".

As stated in 16 Am.Jur. 2d, *Constitutional Law*, Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .
>
> (I)f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

The challenged Section 6(1) had the singular purpose of attempting to set forth a comprehensive standard of care prescribed for physicians during an abortion, both pre-natally and post-natally. The Missouri legislature presumably desired to enact an encompassing standard of care. It is beyond the area of judicial concern and competence as to whether the Missouri legislature would have enacted the remainder of Section 6(1) without the initial sentence, comprising approxi-

mately one-half of the entire challenged Section. They chose not to do so.

As cited with approval in *State* ex rel. *State Board of Mediation* v. *Pigg*, 366 Mo. 798, 820-821 (1951), 244 S.W.2d 75, 84-85,

> "The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.(2d) 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am. Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const.Law, Secs. 152 and 155."

There can be little doubt that the various sentences of this challenged Section were intended as a unified and interdependent whole.

VIII. Section 7—The Termination of Parental Rights.

This challenged Section provides for the arbitrary and conclusive termination of parental rights in the event a live birth results when an abortion had been intended. It applies to all

mothers (unless the procedure was life-saving) and to consenting fathers (only fathers who are spouses being required to consent under Section 3[3]). It applies indiscriminately to all stages of pregnancy[343] and is a crude and coercive threat to dissuade women from electing abortion. It is totally unrelated to the concern of maternal health.

It adopts the dogmatic philosophy of those opposed to abortion under any circumstances: That abortion is the equivalent of murder. Desiring an abortion and the death of a fetus are not synonymous with desiring the death of a live child, in the event an abortion is not successful. An abortion may not initially be available, either for medical or other reasons, or it may be unsuccessful once commenced as envisioned by the statute. This irrebuttable presumption[344] of "unfitness" of and/or "abandonment" by a parent during an abortion has been specifically rejected by a Florida Appellate Court,

> "Appellant further contends, apart from the question of the 'right to privacy' that the termination of a pregnancy illustrates and reflects the 'unfitness of the mother' or 'the abandonment' of the unborn child. . . . Appellant's contentions are equally tenuous and as a practical matter overlook the decisions of the United States Supreme Court . . . We cannot conclude that a mother's decision to terminate a pregnancy gives rise to questions of 'unfitness' or 'abandonment'." *Jones* v. *Smith*, et al., 278 So.2d 339, 343 (Fla.Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974).

The statute itself recognizes the lesser value of fetal life by classifying the taking of "the life of a premature infant aborted alive" as "murder of the second degree".[345] Absent such spe-

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[343] See, IIB1a, supra at 37.

[344] See, IIB3ci, supra at 45.

[345] Section 6(2).

cific language, the taking of such life would be considered "murder in the first degree".[346] In light of *Roe* and *Doe*, this Section is no more sustainable than would be a similar effort to terminate parental rights of persons who experienced contraceptive failure.

In *Doe* v. *Rampton*, etc., et al., supra, the statute provided,

> "Child surviving abortion deemed ward of state.—Any child surviving an abortion shall become a ward of the state and the mother of such child and a father who has consented to such abortion shall have no parental rights with regard to such child."[347]

The unanimous federal panel held,

> "Section 76-7-311 is invalid because it threatens every woman who has an abortion, at any stage of pregnancy and for any reason, with termination of parental rights without due process of law."[348]

Roe and *Doe* clearly stand for the principle that a pre-viable fetus is not the equivalent at law of a living person. "(T)he word 'person', as used in the Fourteenth Amendment, does not include the unborn."[349] This distinction is further demonstrated by the challenged statute's permissive stance towards abortion under certain circumstances and conditions.

As this Honorable Court noted in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), when offering full protection to the rights of putative fathers in regard to their children,

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[346] MO. REV. STAT., Section 559.010.

[347] UTAH CODE ANN., Section 76-7-311.

[348] 366 F.Supp. at 193.

[349] *Roe* at 158.

> "Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family."
>
> . . .
>
> "We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[350]

There are no other statutory provisions providing for arbitrary and conclusive termination of parental rights under any other factual situation. Parents of children who commit upon them the greatest abuses, even acts threatening their very lives, are not subject to the gross denial of due process and equal protection attempted here. This vindictive excessive exercise of state power to punish and to deter women from choosing abortion must not be allowed to persist.

Dr. Warren testified that women "are stressed to some degree whether or not to undergo an abortion. It is a stressful decision." (R. 30). Dr. Warren further testified that it is his medical practice to discuss the possibility of a live birth with his patients only "(i)n second trimester cases . . . as an unlikely probability." (R. 32).

Defendants' witness, Dr. Anderson, the only witness of defendants who possessed personal experience with women undergoing abortions, testified as follows,

> "Q. Doctor, assuming you were performing an abortion in a jurisdiction which had this statutory requirement, and assuming that you were to verbally inform the patient of the provisions of this Section 7 by merely reading it to her

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[350] 405 U.S. at 658.

as it appears, do you have an opinion as to what emotional or psychological effect, or even physical effect, this might have upon the patient?

A. Well, I—I—I can imagine that it would have an—an adverse psychological effect on the patient.

Q. Adverse in what way?

A. Well, the patient has already made a rather tenuous major decision in her life; she needs positive support and not negative input previous to the abortions.

Q. In what way do you consider this to be negative input?

A. Well, I feel that the patient came to us for an abortion. An abortion means delivery of a dead fetus. Very little thought is given by any patient to the possibility of a live fetus coming out of this. That's not what they came to us for. I frankly would not present this to a patient even if it were state law.

Q. Would you choose to violate the law?

A. Yes.

Q. Do you feel that the reading of this provision to the patient would have a significant impact upon her decision-making process in regard to the abortion?

A. In some patients it certainly could." (R. 351-352).

It is no more reasonable for the state to assume that a woman, who is denied an abortion initially for medical reasons prior to the procedure, is any less committed to the abortion than a woman who is denied an abortion because the intended result of the procedure did not occur. Yet, clearly, many women, unable for medical reasons to undergo an abortion, choose to rear the children born to them as loving parents. The singular and obvious purpose of this Section is to coerce, to harass and to

intimidate women into the choice of carrying to term as opposed to the choice of terminating the pregnancy.[351]

This Section places upon the physician the affirmative duty to determine in each case whether: (a) the procedure "was not performed to save the life or health of the mother"; (b) whether the mother consented to such abortion; and (c) whether the father consented to such abortion. After making said determinations and, if the answer to each is in the affirmative, the physician is compelled to "forthwith notify said juvenile court of the existence of such live born infant." Failure to properly make such determinations and to provide such notification, when required, subjects the physician to the penalties of Sections 12 and 14 of the challenged legislation.

The effect of this Section is surprisingly, although nevertheless unconstitutionally, to grant to putative fathers greater rights than are granted therein to fathers who are concomitantly spouses of the patients. A spousal father must consent initially under Section 3(3) for the procedure to occur and therefore, if the abortion is unsuccessful, his parental rights are lost under this Section. A putative father need not consent for the procedure to occur and therefore, if the abortion is unsuccessful, his parental rights are preserved intact. A putative father has full rights in regard to[352] and full responsibilities for[353] his children in Missouri. Despite the unique peculiarity for granting greater rights to putative fathers than to fathers married to the mother, the disparity is nevertheless violative of the precepts of *Stanley*, supra, and its progeny.

This challenged Section discriminates against children resulting from such abortions by denying to them in conjunction

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[351] See, IIB4a, supra at 50.

[352] *In re R.D.H.S.*, etc., 370 S.W.2d 661 (Mo. 1963).

[353] *E—M—R—*, et al. v. *G—E—R—*, 431 S.W.2d 152 (Mo. 1968).

with Section 3(3) supra, the right to a relationship and its accompanying duties and rights with their natural fathers. That relationship is preserved under this challenged Section for such children, only if their natural fathers are not married to their natural mothers.

As succinctly put in the dissenting opinion below,

> "This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process."[354]

As the dissenting opinion rightfully concluded in its discussion of this Section,

> "The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation 'reasonably related to maternal health'."[355]

IX. Section 9—The Prohibition of Saline and Similar Procedures.

This challenged Section seeks to prohibit, after the first twelve weeks of pregnancy, the procedure for abortion "known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac . . ."

The total prohibition of the saline amniocentesis method of abortion is a thinly disguised effort to foreclose effectively all post first trimester abortions and as such it is constitutionally abhorent upon several separate grounds formulated in *Roe* and *Doe*.

This Honorable Court in authorizing the state "(f)or the stage subsequent to approximately the end of the first trimester"

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[354] Jur. St. A-26; 392 F.Supp. at 1377.

[355] Jur. St. A-27; 392 F.Supp. at 1377.

to "regulate the abortion procedure in ways that are reasonably related to maternal health"[356] was careful to delineate the "ways" it had in mind.

> "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise."[357]
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> "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."
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> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."[358]
>
> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to

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[356] *Roe* at 164.

[357] *Id.* at 150.

[358] *Id.* at 163.

those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available."[359]

This Honorable Court never intended to allow the state to prescribe to the physician the particular methods or procedures by which the profession of medicine could be practiced. The state does not attempt to prescribe in regard to any other known medical or surgical area.[360]

The language of the Eighth Circuit Court of Appeals in *Word*, supra, is particularly applicable and persuasive. In *Word*, supra, the Court found each and every regulation proposed to be unrelated to a legitimate state interest in maternal health.

"The city ordinance in question here reflects no recognition of the fundamental rights involved and the commensurate restrictions on state action. Neither are we cited to any persuasive data convincing us that the stringent regulatory measures in the act are necessary to protect either the state's interest in maternal health or future life. No other medical procedures or surgical operations are cited to us where the city or state regulates at the peril of criminal sanctions."

. . .

"Appellee argues . . . the ordinance here does not prohibit abortion but merely regulates the 'persons, conditions

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[359] *Roe* at 165-166.

[360] See, IIB1b, supra at 37.

and procedures under which abortions are to be performed.' While we agree with appellee that the ordinance does not proscribe abortions, we do not agree that that fact, of itself, removes the ordinance from the constitutional realm of *Roe* and *Doe*. The *Doe* decision clearly struck down portions of the Georgia statute governing abortion procedures. Doe v. Bolton, supra 192-200 of 410 U.S., 93 S.Ct. 739. We learn from *Doe* that sweeping regulation of the abortion procedure without regard for the conflicting interests involved will not withstand constitutional scrutiny." . . .

"Viewed another way, there is reason to strike down this ordinance. The ordinance seeks to protect interests that are already adequately protected by (1) the physician's medical judgment and professional, ethical standards and (2) the city and state health regulations which are in effect and which have application to clinical procedures in general. The extra layer of regulation which this ordinance imposes becomes unreasonably burdensome of the patients' and physicians' rights."

. . .

"We think that this myriad of requirements is unduly restrictive of a physician's right to administer his judgment as to an operation that is now established to be, within the first trimester of pregnancy, safer than childbirth. We are referred to no other single surgical procedure where doctors are required to 'prove up' their overall fitness as they are here. As the court states in Doe v. Bolton, supra at 199 of 410 U.S., at 751 of 93 S.Ct.: 'If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment.' To single out physicians and their patients who seek abortions and subject them to this ordinance's overview substantially lim-

its the physician's right to practice and the patient's right to her doctor's independent judgment."[361]

The Fifth Circuit Court of Appeals has held in regard to the licensing of the medical arts,

> "Under all of the cases, we think . . . (the dividing line) is that the State cannot deny to an individual the right to exercise a *reasonable* choice in the method of treatment of his ills, nor the correlative right of practitioners to engage in the practice of a useful profession."[362] (Parenthetical material supplied).

The observation that only the physician can determine the need for and method of appropriate treatment for the patient has been recognized by this Honorable Court in both *Roe* and *Doe*.

Defendants' expert witness, Dr. Anderson, testified: that saline is the most commonly used method during the second trimester (R. 327); that, although he personally believes prostaglandins to be safer than saline, saline is safer than all other known methods (R. 328-329); that saline is safer than child birth (R. 343a); and that, if prostaglandin contraindication warnings, as issued by the Federal Drug Administration, were to be heeded, his clear choice of procedure over all other methods would be saline. (R. 343-343a). Dr. Anderson further testified that many medical schools are using the saline method (R. 365); that the availability of prostaglandins is limited (R. 335); that in certain areas the physiological role of prostaglandins is totally unknown and it is quite possible that the side effects of prostaglandins are unknown due to their recent

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[361] 495 F.2d at 1351-1352.

[362] *England*, et al. v. *Louisiana State Board of Medical Examiners*, et al., 259 F.2d 626, 627 (5th Cir. 1958), *cert. denied*, 359 U.S. 1012 (1959).

development (R. 363, 366); and that saline is not an "unsafe procedure" (R. 365).

No evidence was introduced to the District Court indicating that any physician in the State of Missouri was capable, willing or experienced in the use of prostaglandin.[363]

This challenged Section attempts to prohibit any procedure whereby "amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor." It cannot be ignored that this description includes the use of prostaglandins. Amniotics fluid is withdrawn during the prostaglandin procedure (R. 36 [Dr. Warren] and R. 86 [Dr. Kerenyi]) and, in fact, it is the recommended procedure by the Federal Drug Administration (R. 36-37 [Dr. Kerenyi]). Prostaglandins are injected in liquid fluid form. (R. 318 [Dr. Anderson]). The purpose of using prostaglandins is to kill the fetus and induce labor (R. 87 [Dr. Kerenyi] and R. 333-334 [Dr. Anderson]). Following the injection of prostaglandin there is a "period of uterine tetany that lasts at least 20 minutes, during which the fetus received no oxygen" and this produces death or "extremely severe" brain damage (R. 345-346 [Dr. Anderson]). This challenged Section also excludes the use of any other abortifacient fluids administered in like fashion, which may be discovered in the future and, perhaps, be safer than both saline and prostaglandins.

The nature of medical practice demands a degree of professional independence, isolated from the vagaries of politically influenced legislation. As affirmatively stated in *Doe*,

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[363] One District Court has recognized that "(t)here are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy." *Baird*, et al. v. *Bellotti*, etc., et al., 393 F.Supp. 847, 853 (D. Mass. 1975), *cert. granted*, — U.S. — (1975).

"If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that '[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications.' *Dent* v. *West Virginia*, 129 U.S. 114, 122-123 (1889). See *United States* v. *Vuitch*, 402 U.S. at 71."[364]

If a consensus of physicians is not constitutionally permitted, by what logic can the consent of the legislature regarding a medical decision be condoned.

A Congressional attempt to restrict the amount of alcohol a physician could prescribe during Prohibition was similarly declared constitutionally impermissible,[365] as was a recent attempt by the District of Columbia City Council to restrict the practice of acupuncture.[366]

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[364] *Doe* at 199-200.

[365] See, *United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923).

[366] See, *Wensel*, et al. v. *Washington*, etc. (D.C. Super. Ct., No. 11004-74, Apr. 10, 1975) voiding a District of Columbia regulation limiting the practice of acupuncture to physicians and dentists. The Court held the regulation unconstitutionally interfered with medical practice by not permitting the practice of acupuncture by others under the direction, care or supervision of a physician.

No persuasive data was offered to the District Court to justify the exclusion of the saline method. It should be noted that this challenged Section not only prohibits the injection of a saline fluid but also any "other fluid". The exclusion of all "other fluid(s)" makes a legislative presumption that no such method can or will be developed in the future capable of passing legislative muster as to being in the interests of maternal health.

Even assuming, *arguendo*, that this Honorable Court intended to authorize the states to legislate which particular surgical or operative methods might or might not be used by physicians, the evidence at trial clearly did not justify the total exclusion of the saline method and similar methods proscribed by this challenged Section.

The testimony of Dr. Warren was that 75% of all abortions performed in the second and third trimesters within the United States are by the saline method. (R. 42). Dr. Kerenyi placed their prevalence at 80%. (R. 89-90) and defendants' witness, Dr. Anderson placed the figure at 68.7%. (R. 327). Prohibition of the saline procedure would be effectively to foreclose nearly all second trimester abortions throughout the State of Missouri, for the remaining methods performed are highly more dangerous to patients.

This Section attempts by indirection to impose upon patients and their physicians an alternative less effective method for second trimester abortions, that of prostaglandins. The trial evidence indicated that live births are more frequent with the use of prostaglandins than with saline. (R. 47, 96). In other words, this Section leaves as the only safe alternative, a method which is less medically effective as to its intended result and one not readily practiced in the United States and, perhaps, not practiced at all in the State of Missouri.

The other alternative methods remaining impose upon patients and their physicians medical procedures far more dan-

gerous than the prohibited method of saline. Defendants attempted to deluge the District Court with articles discussing the medical dangers of saline. The mortality and morbidity risks of any procedure are meaningless, unless compared to the risks of other available and like procedures. The medical literature is replete with articles discussing every known procedure and their respective complications. Plaintiffs do not dispute that the use of the saline method involves risk to the patient; as do all other known methods of abortion or surgical procedure.

Dr. Warren testified that all medical procedures involved a risk of mortality (R. 34); that at this point of time, there is no reason to believe that the mortality rate of prostaglandins is less than that with saline (R. 42); that the mortality rate with saline is 17.5 per 100,000 (R. 43); that the mortality rates for the two other methods not proscribed by the statute are 200 per 100,000 for hysterotomy and 200 or 250 per 100,000 for hysterectomy (R. 43); and that the saline method is safer than childbirth (R. 44). Dr. Warren further testified that while saline has been in use for ten years in the United States, prostaglandins have been used on a non-experimental basis only since January 1, 1974 (R. 45-46).

Dr. Kerenyi testified that in his experience there has been no related deaths and one reported, but saline unrelated, death ten years ago in 1964 in some 12,000 saline procedures (R. 86, 88); that saline is the only method for which reliable statistics are available due to an inadequate experience with the other methods suggested by defendants (R. 87); that saline is the safest method (R. 88); that mortality with saline is 15 per 100,000, with hysterotomy 200 per 100,000 (R. 89, 88) and with child birth 20 per 100,000 (R. 94), making saline safer than delivery. (R. 95). Dr. Kerenyi further testified that all side effects of prostaglandins are not presently known (R. 96); that he is an investigator for the Upjohn Company, the exclusive licensed manufacturer (R. 335 [Dr. Anderson]); and that Upjohn reports a

60% gastro-intestinal side effect rate with the use of prostaglandins (R. 97-99).

> "When certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[367]

This challenged Section has been penned with a broad brush. It excludes the most overwhelmingly used method of abortion during the mid-trimester, excludes methods not yet and to be developed, which may prove more or less safe than those excluded, and does not exclude methods such as hysterectomy and hysterotomy which are acknowledged to be at least ten times less safe than saline.

Further, it unconstitutionally favors the one choice of bearing children over the election of abortion, inasmuch as the uncontradicted testimony showed saline to be safer than child birth.[368]

This identical question was resolved by a federal panel in Kentucky.

> "This section prohibits the use of the saline method of abortion after the first trimester of pregnancy. Defendants contend, and it is not seriously questioned, that the prostaglandin method is safer and, in general, clinically more desirable than the saline method. In each process a solution is injected into the amniotic cavity of the patient, causing contractions of the uterus sufficient to expel the fetus through the vagina. The mere fact prostaglandin is safer does not supply sufficient reason to exclude other methods, especially where doing so would unreasonably infringe upon

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[367] *Roe* at 155.

[368] See, IIB4a, supra at 50.

fundamental rights. After an examination of the evidentiary material submitted by the parties, the Court is of the opinion that the saline method of abortion has been wrongfully excluded. Practically all post-first trimester abortions are now performed by the saline method. According to the preponderance of evidence, prostaglandins are manufactured and controlled by Upjohn Company and are available only to a select, elite group of physicians. At present, there are no physicians in Kentucky competent in the technique of prostaglandin amnio infusion. Consequently, this method of abortion is not readily available in this geographical territory. There are no centers or doctors licensed to perform such a procedure in this area. With prostaglandin unavailable, and saline prohibited, the woman wishing abortion after the first trimester is practically rendered destitute, her only recourse, hysterotomy, being by far the most dangerous of the three methods. Thus, the Court is convinced from the evidence that in order for there to be an effective, safe method, and one which is generally available for the performing of post-first trimester abortions, this section must be held to be invalid."[369]

In *Doe*, this Honorable Court precluded the state from requiring a doctor to receive the concurrence of two other trained medical physicians.[370] It cannot be said that the concurrence of the Missouri legislature as to the physician's best judgment is more appropriate and thus sustainable. The noted remedies in case of a physician's abuse of proper medical judgment, those of "judicial and intra-professional",[371] "professional censure and deprivation of his license",[372] are the most appropriate re-

[369] *Wolfe*, supra at note 314, at 637.

[370] *Doe* at 199-200.

[371] *Roe* at 166.

[372] *Doe* at 199.

courses. The attempt by the Missouri legislature to impose a prior censorship upon the physician-patient relationship and the mutual medical decisions to be therein made is constitutionally invalid.[373]

X. **Sections 10 and 11—Record Keeping and Reporting.**

Challenged Sections 10 and 11 provide for the Missouri Division of Health to require the maintenance and preservation for seven years of medical data on all abortions performed. It should be noted that at the time of trial, the Missouri Division of Health had not promulgated rules and regulations pertaining to the same. For the convenience of this Honorable Court, the presently published cover letter, instructions and forms have been reprinted, *in toto*, as an addendum to this brief.[374]

It should be noted that the information, authorized to be sought and to be required by the challenged Sections and as formulated, applies to all abortions, regardless of the gestational stage, contrary to the dictates of *Roe* and *Doe*.[375] No evidence was presented to the District Court justifying the record keeping requirements as bearing on maternal health. No evidence was introduced which indicated similar reporting or record keeping requirements for any other comparable medical or surgical procedure, required as an assistance to patient health.[376] Similar

[373] As to the prohibition against prior restraint of fundamental rights involving freedom of speech and the right of privacy, see *Erznozrik*, etc. v. *City of Jacksonville*, — U.S. — (1975).

[374] The *Addendum* to this brief comprises in the following order: the cover letter dated January 10, 1975 from Director Land at A-1; multipaged instructions dated 1/1/75 at A-2-A-5; original reporting form SS2-1/75 at A-6; and presently used form, entitled "Induced Pregnancy Termination Report" at A-7.

[375] See, IIB1a, supra at 37.

[376] See, IIB1b, supra at 37.

requirements were not shown to exist for childbirth delivery services.[377]

Federal court decisions to date have unanimously rejected comparable reporting requirements, when the same sought to apply to abortions at all stages of pregnancy.

In *Word*, supra, the ordinance required information as to "the name, age and address of the person, the dates on which he examined her and his best medical judgment as to the date of conception of the fetus."[378] The Eighth Circuit held the ordinance void for failure to exclude the first trimester[379] and for imposing "an extra layer of restriction . . . that unduly penalize(s) those patients who seek and those doctors who choose to perform abortions . . ."[380]

In *Doe* v. *Rampton*, etc., et al., supra, the statute required,

> "Physician's report to state department of health.—In order for the state department of health to maintain necessary statistical information and in order to ensure enforcement of the provisions of this act, any physician performing an abortion must obtain and record in writing the following information: The age of the pregnant woman; her marital status and residence; the number of previous abortions performed on her; the medical reason necessitating the abortion; the hospital or other facility where performed; the weight in grams of the fetus aborted; the pathological description of the fetus; the given menstrual age of the fetus; the measurements; and the medical procedure used. Said information, together with all written consents required for the abortion and a certification by the physician that the fetus was or was not capable of survival outside of the mother's womb, must be filed by the physician with the state department of health within ten days after the abortion."[381]

[377] See IIB4a, supra at 50.

[378] 495 F.2d at 1354.

[379] *Id.* at 1351.

[380] *Id.* at 1352.

The Court held in this regard that,

> "Section 76-7-315 is invalid because it subjects the abortion decision to public scrutiny by making the details of every abortion a matter of public record and thus chills exercise of the right of privacy in the abortion decision."[382]

Minnesota Health Department Regulations 281 and 282, adopted pursuant to Minnesota Revised Statutes, Section 145.416, provided,

> "MHD 281: Internal Records of the Ambulatory Facility
>
> (a) Patient Records
>
> The pregnancy termination facility shall keep records of each patient undergoing a pregnancy termination procedure which shall include admission and discharge notes, a signed consent form, pertinent medical history, results of tests and examinations, termination procedure report, pathology report, report of after-care, counseling records, results of follow-up contact, and other progress notes.
>
> (b) Complications
>
> All surgery-related or anesthesia-related complications which result in morbidity or death of a patient shall be recorded in detail in the patient's medical record.
>
> (c) Confidentiality
>
> Each facility shall maintain and ensure confidentiality of individual patient records."

[381] UTAH CODE ANN., Section 76-7-315.

[382] 366 F.Supp. at 193.

"MHD 282: Reports to the Board

(a) Statistical Reports

Each ambulatory facility shall submit a written compilation of statistical data quarterly to the Board on such forms and in such manner as the Board may prescribe.

(b) Reporting Terminations

An ambulatory facility shall report all pregnancy terminations performed by its staff as follows:

(1) By the 10th of each month all pregnancy termination performed in the ambulatory facility during the preceding month shall be reported on forms prescribed by the Board which shall include but not be limited to the following items:

Patient's city, county and state of residency

Census Tract for City of Minneapolis and City of St. Paul

Patient or Chart No.

Age

Race

Marital Status

Number of Living Children

Facility Name

Facility Address

Number of Previous Induced Pregnancy Terminations of Patient

Estimate of Gestational Age

Date of Pregnancy Termination

Type of Termination Procedure

(2) All surgery-related or anesthesia-related complications which result in morbidity or death of a patient shall

be reported in writing to the Board within 15 days from the notification to the ambulatory facility of the morbidity or death of the patient.

(3) The Board shall ensure and maintain confidentiality of an individual pregnancy termination records."[383]

The unanimous District Court panel held,

> "Finally, we reach the Regulations for Termination of Pregnancy. The regulations are completely without constitutional foundation insofar as they may be applied to facilities involved in administering to first trimester abortions. The words of *Roe* are unequivocal—'free of interference by the State'."[384]

Similar requirements enacted by the City of Chicago's Board of Health required,

"IV. *Records and Reports, Inspection*:

(a) Each Abortion Service shall keep records including admission and discharge notes, histories, results of tests and examinations, nurse's work sheets, social service records, and other progress notes of patients, and it shall submit such records when the Chicago Board of Health shall so require.

(b) Each Abortion Service shall prepare a monthly report which shall be submitted to the Chicago Board of Health on forms prepared by the Chicago Board of Health not later than the 5th day following the end of the month. Such reports shall include the following:

(1) Number of patients requesting abortions

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[383] 378 F.Supp. at 1026-1027.

[384] 378 F.Supp. at 1018.

(2) Number of patients and age on whom abortions were performed according to the period of gestation and method of termination of pregnancy

(3) Number of patients for whom abortions were refused and the reasons therefor; and

(4) Number of patients referred to other abortion services

(5) Name and address of patients with a statement of complications following elective abortions describing the nature of the complication.

(c) A statement indicating informed consent in writing and a signed authorization for the performance of an abortion shall be obtained for each patient prior to the procedure."[385]

The Seventh Circuit in *Friendship Medical Center, Ltd.*, supra, invalidated those provisions firstly because,

> "(T)hey regulate during the first trimester precisely the type of things that the Supreme Court has said cannot be regulated until after that 'compelling point'."

and secondly, because,

> "The Chicago Board of Health's Rules on Abortion Services regulate comprehensively physicians who perform abortions, while at the same time leaving other medical procedures, often much more complex and dangerous in terms of the patient's health, up to the good judgment of the physician. . . . The Board of Health has offered no

[385] Set forth in *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 367 F.Supp. at 610-611.

> sufficiently compelling reason to justify this difference in treatment."[386]

Not a single court has upheld the reporting and recordkeeping provisions authorized under these challenged Sections and subsequently enacted, when the same have as here, intruded through application upon the early stages of pregnancy and have not been demonstrated to relate to the maternal health at later stages of pregnancy.

A New York court in light of *Roe* and *Doe* has similarly held that the requirement of the name and address of the aborting patient upon a fetal death certificate violated the patient's right of privacy, the physician-patient relationship and was contrary to public policy.[387]

CONCLUSION

The statement by the First Circuit in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975) is equally applicable here.

> "We need not determine whether there may exist situations where the practical impact of a restriction upon abortions would be so insignificant that constitutional scrutiny would not be triggered. That is certainly not the situation here. . . . As the Supreme Court made clear in Doe v. Bolton, it is not only complete proscription of abortion which is unconstitutional, but barriers which 'unduly restrict' the rights of the woman . . ."

While 75% of the world's population live in countries in which abortion is permitted under circumstances broader than

[386] 505 F.2d at 1152-1153, *cert. denied*, 420 U.S. 997 (1975).

[387] *Schulman*, et al. v. *New York City Health and Hospitals Corporation*, et al., 75 Misc. 2d 150 (1973), 346 N.Y.S.2d 920.

merely to save the life of the patient;[388] the full impact of this Honorable Court's decisions in *Roe* and *Doe* remain unavailable to the vast majority of our nation's citizens. It is estimated that during 1974, the first full year following the decisions in *Roe* and *Doe*, at minimum 365,770 and at maximum 876,240 women who desired abortions were unable to obtain one.[389] Based on a total of 892,200 abortions performed, approximately 29% to 50% of the need for abortions was not met.

In 36 states less than one-third of the state's residential need was met in 1973 and in only four states was more than two-thirds of the state's residential need met, based on higher estimates and giving all benefits of doubt to the conclusion that such needs were met.[390] By the first quarter of 1974, 85% of the nation's public hospitals had not provided abortion services for their communities.[391]

This denial of access to the full enjoyment of constitutional rights has been encouraged by legislative interference, of which the challenged Sections herein are sadly typical. The words of this Honorable Court many years ago, today still ring true,

> "(C)onstitutional rights . . . can neither be nullified openly and directly by state legislators or state executive

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[388] Population figures were taken from THE WORLD ALMANAC & BOOK OF FACTS 1975, Newspaper Enterprise Association, Inc., New York: 1974 for selected United Nations membership countries; and compared with abortion practices as reported in a pending publication entitled *Legal Handbook on Contraception, Voluntary Sterilization and Abortion: Country Profiles and Checklists*, THE FLETCHER SCHOOL OF LAW AND DIPLOMACY, Medford, Mass.: 1975. The 75% figure is, accordingly, a conservatively low estimate.

[389] *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area*, THE ALAN GUTTMACHER INSTITUTE, New York: 1975, at 22, at Table D and at 24, at Table E.

[390] *Id.* at 32, at Table Q.

[391] *Id.* at 39, at Table Y.

> or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" *Cooper*, et al. v. *Aaron*, et al., 358 U.S. 1, 17 (1958).

Each and every statutory Section herein challenged has been previously adjudicated by one or more federal panels and/or appellate circuits. With the sole exception of the District Court opinion rendered below, said federal courts have uniformly voided and declared unconstitutional all of the challenged legislation.[392]

Wherefore, plaintiffs respectfully pray that the opinion of the Appellate Court be reversed as to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 and the same be declared unconstitutional; and plaintiffs respectfully pray that the opinion of the Appellate Court be affirmed as to Section 6(1) and the same be declared unconstitutional.

Respectfully submitted

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[392] On November 22, 1975 a temporary restraining order was issued against the enforcement and application of an Illinois statute incorporating all of the provisions herein challenged. *Wynn*, et al. v. *Scott*, etc., et al. (N.D.Ill., No. 75C3975, Nov. 22, 1975).

Certificate of Service

I, the undersigned attorney for plaintiffs and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Brief for Planned Parenthood of Central Missouri, a Missouri corporation, David Hall, M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees," upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to the Honorable J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri, 1320 Market Street, St. Louis, Missouri 63103.

Frank Susman
Susman, Schermer, Willer & Rimmel
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
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APPENDIX

CHRISTOPHER S. BOND
GOVERNOR

MISSOURI
DEPARTMENT OF SOCIAL SERVICES

DIVISION OF HEALTH
BROADWAY STATE OFFICE BUILDING
P O BOX 570
JEFFERSON CITY
65101

LAWRENCE L. GRAHAM
DIRECTOR
DEPARTMENT OF SOCIAL SERVICES

HERBERT R. DOMKE, M.D., DR.P.H.
DIRECTOR
MISSOURI DIVISION OF HEALTH

January 10, 1975

Dear Hospital or Clinic Director:

House Bill 1211 passed by the 77th General Assembly requires all induced abortions be reported to the Division of Health on forms provided by the Division. Enclosed is a supply of induced abortion forms, instruction manual, and self-addressed envelopes. The forms should be returned to the Division of Health at least monthly by the 15th day of the following month.

The census tract coding directories required to fill out the census tract code will be provided at a later date. The census tract space may be left blank until the directories are available.

Any questions regarding the required abortion form or need for additional supplies can be addressed to Mr. Charles Bell, Director, Bureau of Vital Records, Missouri Division of Health, P.O. Box 570, Jefferson City, Missouri 65101.

Sincerely,

Garland Land

Garland Land, Director
Missouri Center for Health Statistics

GL:vg

Enc.

1/1/75

INSTRUCTION FOR COMPLETING
MISSOURI INDUCED ABORTION FORM

INTRODUCTION

This handbook is designed to assist those responsible for the completion of the induced abortion form. The Missouri Division of Health of the Department of Social Services has the responsibility under House Bill 1211 of the 77th General Assembly, 1974, to promulgate forms for the reporting of induced abortions. Section 10 of House Bill 1211 is as follows:

> "1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.
>
> "2. The forms shall be provided by the state division of health.
>
> "3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers."

STANDARDS FOR COMPLETING THE INDUCED ABORTION FORM

A. Use the current form provided by the Missouri Division of Health.

B. Type all entries whenever possible. If a typewriter is not used, print legibly in dark ink.

C. Complete all items or attach a note explaining any omissions.

D. Do not make alterations or erasures.

E. Do not submit carbon copies, reproductions or duplicates for filing.

F. Use abbreviations only when space on form is inadequate for complete entry.

G. Refer problems not covered in these instructions to the State Bureau of Vital Records.

H. Return all completed induced abortion forms for a month by the 15th of the next month to the Bureau of Vital Records, Missouri Division of Health, P.O. Box 570, Jefferson City, Missouri 65101.

SPECIFIC INSTRUCTIONS FOR
COMPLETING THE INDUCED ABORTION FORM

2. FACILITY NAME

Enter the full name of the hospital or clinic where the abortion took place.

3a. LOCATION - CITY

Enter the name of the city where the abortion took place.

3b. LOCATION - COUNTY

Enter the name of the county where the abortion took place.

4. ATTENDING PHYSICIAN

Enter the name of the physician who performed the abortion.

5. PHYSICIAN ADDRESS

Enter the address of the physician who performed the abortion.

6. PHYSICIAN LICENSE NUMBER

Enter Missouri state license number of the physician who performed the abortion.

7a. USUAL PLACE OF RESIDENCE - CENSUS TRACT

Enter the census tract number where the patient actually resides through the use of census tract coding directories provided by the Missouri Center for Health Statistics. Coding directories have been prepared for all cities greater than 15,000 population. If the patient lives in a city smaller than 15,000 population, leave blank.

7b. USUAL PLACE OF RESIDENCE - CITY

Enter the name of the city, town, or location where the patient actually resides. See NOTE under item 7e. which follows for explanation of "residence."

7c. INSIDE CITY LIMITS

Enter "yes" if the patient resides inside the boundaries of an incorporated city, town, or location mentioned in 7b. Otherwise, enter "no."

7d. COUNTY

Enter the name of the county where the patient actually resides. See NOTE under item 7e. which follows for explanation of "residence."

7e. STATE

Enter the name of the State in which the patient actually resides. This may differ from the State used in the patient's Post Office address.

NOTE: Patient's residence is the place where she lives. This is not necessarily the same as her "Home State," "Voting Residence," or "Legal Residence." Never enter a temporary residence such as one used during a visit, business trip, or a vacation. Residence for a short time at the home of a relative, friend, or home for unwed mothers for the purpose of awaiting the birth of a child is considered to be temporary and should not be entered here. Place of residence during a tour of military duty or during attendance at college is not considered as temporary.

7f. ZIP CODE

Enter the zip code of the city mentioned in item 7b.

8. PATIENT NUMBER

Enter the medical record or clinic number of the patient who had the abortion.

9. BIRTH DATE

Enter the birth date of the patient. If the birth date is unknown, enter the age.

10. RACE

Enter a check in the box indicating the race of the patient. The category "white" includes Mexican American. The category "black" includes negro and Afro American. The "other" category includes American Indian, Chinese, Japanese, Korean, Filipino, Hawaiian, etc. If the "other" category is checked, specify the race.

11. MARITAL STATUS

Enter a check in the box indicating the marital status of the patient at the time of the abortion. If a marriage has been annulled, check "never married."

12. EDUCATION

Enter the number of the highest grade completed in "regular" schooling in the space for elementary school, high school or college.

NOTE: Do not enter any other kind of schooling or training. While beauty and barber schools; business or trade schools, and the like, are important, they are not considered "regular" schools for the purpose of this item.

13. DATE OF THIS ABORTION

Enter the date (month, day, year) that the abortion was performed on this patient.

14. DATE LAST NORMAL MENSES BEGAN

Enter the exact date (month, day, and year) of the beginning of the patient's last normal menstrual period. If the exact day is unknown, but the month and year are known, obtain an estimate of the day from the patient or enter only the month and year. Enter "unknown" if the date cannot be determined.

15. ESTIMATED GESTATIONAL AGE IN WEEKS

Enter the physician's estimate of the length of gestation in weeks as estimated by uterine size prior to performance of abortion.

16. PROVISION FOR FOLLOWUP

Check the box "yes" or "no" indicating whether or not provisions have been made for the patient to be followed up by the physician following the abortion.

17. NUMBER OF LIVING CHILDREN

Enter the number of children born alive to this patient who are still living at the time of this abortion. Enter zero if the patient does not have any living children.

18. NUMBER BORN ALIVE NOW DEAD

Enter the number of children born alive to this patient who are no longer living at the time of this abortion. Enter zero if there has been no children born alive to the patient who are now dead.

19. NUMBER OF FETAL DEATHS

Enter the number of previous pregnancies that did not result in a live born infant due to a miscarriage, stillbirth, or spontaneous abortion. Do not include any previously induced abortions. Enter zero if this is the first pregnancy for this patient or if all previous pregnancies resulted in live born infants or were terminated through induced abortions.

20. NUMBER OF PREVIOUS INDUCED ABORTIONS

Enter the number of previous pregnancies that did not result in a live born infant due to an induced abortion. Enter zero if this is the first pregnancy for this patient or if all previous pregnancies resulted in live born infants or stillbirths.

21. METHOD OF ABORTION

Check the procedure used in performing the abortion.

22. IMMEDIATE COMPLICATIONS

Specify any complications that occurred before the patient left the hospital or clinic.

Department of Social Services
MISSOURI DIVISION OF HEALTH

REPORT OF INDUCED ABORTION

1.

FACILITY INFORMATION

FACILITY NAME	CITY	COUNTY
2.	3a.	3b.
ATTENDING PHYSICIAN	PHYSICIAN ADDRESS	PHYSICIAN LICENSE NUMBER
4.	5.	6.

PATIENT INFORMATION

USUAL PLACE OF RESIDENCE – CENSUS TRACT	CITY	INSIDE CITY LIMITS ☐ Yes ☐ No
7a.	7b.	7c.
COUNTY	STATE	ZIP CODE
7d.	7e.	7f.

PATIENT NUMBER	RACE	MARITAL STATUS	EDUCATION – Specify highest grade completed
8.	☐ 1 White ☐ 2 Black ☐ 9 Other – (Specify) _____	☐ 0 Never Married ☐ 1 Married ☐ 2 Widowed ☐ 3 Divorced ☐ 4 Separated	Elementary or High School (1-12) _____ College (13-17+) _____
BIRTH DATE (MONTH, DAY, YEAR)			
9.	10.	11.	12.

MEDICAL INFORMATION

DATE OF THIS ABORTION (MONTH, DAY, YEAR)	DATE LAST NORMAL MENSES BEGAN (MONTH, DAY, YEAR)	ESTIMATED GESTATIONAL AGE IN WEEKS	HAS PROVISION BEEN MADE FOR FOLLOWUP WITH PT. ☐ Yes ☐ No
13.	14.	15.	16.
NUMBER OF LIVING CHILDREN	NUMBER BORN ALIVE NOW DEAD	NUMBER OF FETAL DEATHS	NUMBER OF PREVIOUS INDUCED ABORTIONS
17.	18.	19.	20.

METHOD OF ABORTION

- ☐ 1 Suction Curettage
- ☐ 2 Sharp Curettage
- ☐ 3 Injection of Prostaglandin
- ☐ 4 Hysterotomy
- ☐ 5 Hysterectomy
- ☐ 6 Other (Specify) _____

21.

SPECIFY ANY IMMEDIATE COMPLICATIONS:

RETURN MONTHLY REPORT TO
BUREAU OF VITAL RECORDS
MISSOURI DIVISION OF HEALTH
DEPT. OF SOCIAL SERVICES
P. O. BOX 570
JEFFERSON CITY, MO 65101

INDUCED PREGNANCY TERMINATION REPORT

FACILITY NAME _____
STREET ADDRESS _____
CITY _____ ZIP CODE _____
County _____

MISSOURI PHYSICIAN LICENSE NUMBER | PHYSICIAN'S INITIALS

PATIENT INFORMATION

Do Not Write In This Space	Patient Number	City of Residence	Inside City Limits Specify Yes or No	County of Residence	State of Residence (abbreviation)	Zip Code	Age	Race (Check One)	Marital Status (Check One)	Education – Specify Highest Grade Completed
								(1) White (2) Black (9) Other	(0) Never Married (1) Married (2) Widowed (3) Divorced (4) Separated	

MEDICAL INFORMATION

Date of Abortion mo./Day/Year	Date Last Normal Menses Began mo./Day/Year	Estimated Gestational Age in Weeks	Number of Living Children	Number of Children Born Alive Now Dead	Number of Fetal Deaths	Number of Previous Induced Abortions	Method of Abortion (Check One)	Complications Within 48 Hours (Check All Applicable)
							(01) Suction Curettage (02) Sharp Curettage (03) Injection of Prostaglandin (04) Hysterotomy (05) Hysterectomy (06) Other (specify on back)	(01) None (02) Hemorrhage (03) Uterine Perforation (04) Cervical Laceration (05) Infection (07) Retained Products (09) Other (specify on back)

DATE COMPLETED

NAME AND TITLE OF PERSON COMPLETING REPORT